

Community Forest Management in Northern Thailand:
Perspectives on Thai Legal Culture

by

Nuthamon Kongcharoen
LL.B., Chulalongkorn University, 1990
LL.M., Chulalongkorn University, 1994
LL.M., Indiana University - Indianapolis, 2007

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Supervisory Committee

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Supervisory Committee

Dr. Andrew Harding (Faculty of Law)
Co-Supervisor

Dr. Philip Dearden (Department of Geography)
Co-Supervisor

Dr. Michael M'Gonigle (Faculty of Law)
Committee Member

Abstract

Supervisory Committee

Dr. Andrew Harding (Faculty of Law)

Co-Supervisor

Dr. Philip Dearden (Department of Geography)

Co-Supervisor

Dr. Michael M'Gonigle (Faculty of Law)

Committee Member

In northern Thailand, legal and social change creates dilemmas for forest conservation. On the one hand, Thailand suffers from severe deforestation and biodiversity degradation mainly as a result of human activities that overuse and encroach on forest areas. On the other hand, forestry law has, in turn, intruded on traditional communities that lived in and relied on the forest before modern state law diminished their lands and community rights. One of the potential solutions to this dilemma is community forest management (CFM), which acknowledges the forest stewardship of the communities who rely on the forest and helps them to become better forest protectors.

CFM refers to people's participation in forest conservation in the form of collective community action. The right to practise CFM is guaranteed in the Thai *Constitution* as a community right. However, state forestry law provides direct authority to government agencies and dominates forest management without reference to the *Constitution*.

My hypothesis is that the Thai legal system is not compatible with CFM because the legal culture is based on written law and not on living law, which comes from the legal consciousness of the villagers and government officers who practise CFM.

I use interviews as a research method to investigate the legal consciousness of three groups of people involved in implementation of CFM: members of three selected northern lowland and hill tribe communities/villages; government officers; and legal professionals. I apply green legal theory to analyze the two types of law governing CFM: state law and the law of the commons. People in the selected forest communities apply their own CFM regulations and use state forestry law for support only when their regulations cannot handle extreme situations. The villagers' own CFM – the law of the commons – together with state law, creates their "living law". Government officers cooperate with CFM, knowing that it will help them fulfill their

mission of forest conservation. In contrast, legal professionals rely only on state forestry law rather than the *Constitution*, despite its supremacy, and ignore the law of the commons.

To explain this phenomenon, I “decode” Thai legal culture by investigating its historical and social contexts. I also examine the legal education system, law making processes, legal commentaries and court decisions, to understand what shapes Thai legal culture. In my view, the narrow focus on statute law in Thai legal culture, and the focus on law as a profession rather than as a justice-based discipline, can be explained by the “modernization” of Thai administration and laws, and by the encroachment of globalization and capitalism, both of which have resulted in moving away from traditional land management based on the commons.

I conclude by suggesting that the acceptance of CFM in Thai legal culture can be improved by encouraging socio-legal study, increasing understanding of CFM, implementing constitutional legal principles – and by reclaiming the law of the commons.

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Dedication

To all living things

Abbreviations

CFMB	Community Forest Management Bureau
MNRE	Ministry of Natural Resources and Environment of Thailand
DNWP	Department of National Parks, Wildlife and Plant Conservation, Thailand
CFM	Community Forest Management
IMPECT	Inter-Mountain Peoples' Education and Culture in Thailand Association
IUCN	International Union for Conservation of Nature and Natural Resources
JoMPA	Joint Management of Protected Area, Thailand
NFN	Northern Farmers' Network, Thailand
NGOs	Non-Government Organizations
PAs	Protected Areas
RFD	Royal Forestry Department of Thailand
TAO	Tambon Administration Organization (Thai local administration in subdistrict)

Glossary

Hekho	Spiritual leader in Karen community
Kamnam	Headman of Subdistrict
Khon Muang	Local people in Northern Thailand
Maeban	Housewife
Muban or Ban	Village
Phi Khunnam	Headwater spirit
Phuyai Ban	Headman of village
Supchata	A ceremony intended to provide blessings for long life
Tambon	Subdistrict
Wat	Temple

CHAPTER 1 INTRODUCTION

“At the present as well as any other time, the center of gravity of legal development lies not in legislation, nor in juristic, nor in judicial decision, but in society itself.”

Eugen Ehrlich, 1912¹

The everyday practice of law is often in conflict with the legislation and judicial decisions that create legal culture in a given society. This is particularly true concerning the implementation of state law and law of the commons regulating community forest management (CFM) in Thailand. My hypothesis in this dissertation is that the Thai legal system is not compatible with CFM because the culture of the Thai legal profession is based on written law and not on living law, which comes from the legal consciousness of the villagers and government officers who practise CFM.

1.1 Starting Point

The world's population is increasing rapidly while natural resources are becoming exhausted by over-exploitation.² At the same time, poverty and social injustice are making the situation worse for some groups, such as people who rely on the forest in Thailand.³ Fifty years ago, Thailand used to be a country rich in tropical forests but, since then, the forest in Thailand has been declining rapidly.⁴ Although the Thai government has enacted forestry laws to

¹ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll (New York: Russell & Russell, 1962) at 1.

² United Nations Environment Programme, *Decoupling Natural Resource Use and Environmental Impacts from Economic Growth: A Report of the Working Group on Decoupling to the International Resource Panel*, DTI/1388/PA, UNEP, 2011.

³ Reiner Buergin, *'Hill Tribes' and Forest: Minority Policies and Resource Conflicts in Thailand*, SEFUT Working Paper No.7, Socio-Economics of Forest Use in the Tropics and Subtropics (Freiburg: University of Freiburg, 2000), online: University of Freiburg <<http://www.freidok.uni-freiburg.de/freidok/>>. at 3-10; Jeffery Race, "The War in Northern Thailand" (1974) 8:1 *Modern Asian Studies* 85 at 86-90; Forest Peoples Programme, *Karen People Forcibly Expelled from the Kaeng Krachan National Park in Thailand* FPP E-Newsletter: (February 2012) online: Forest Peoples Organization <<http://www.forestpeoples.org/sites/fpp/files/publication/2012/02/fpp-e-newsletter-february-2012-colour-english.pdf>>.

⁴ Claudio O. Delang, *The Political Ecology of Deforestation in Thailand* (2005) 90:3 *Geography* 225 at 225.

manage forest areas, deforestation has continued to occur.⁵ At the same time, legislation creating “forest areas” has resulted in the expulsion of many communities that were living in and relying on the forest before their lands became gazetted forest areas.⁶

To resolve the problem of deforestation while maintaining their livelihoods, people who depend on the forest have created a concept that allows them to participate in forest management and exercise their rights to use the forest. This concept, called “community forest management” (CFM), has adapted hill tribes’ traditions as well as conservation ideas developed by scholars and non-governmental organizations (NGOs).⁷ Although Thailand has created agencies to govern preservation of forests, community participation is also necessary for forest conservation.⁸ In addition, self-determination and the right to live in traditional ways that are in harmony with nature are the foundations of CFM. Ideally, CFM would help to protect the forest and biodiversity while reducing poverty and maintaining a sustainable way of life.⁹ Meanwhile, legal protection of CFM practices may help to resolve land use conflicts in Thai society.¹⁰

However, the place of CFM in Thai society has been unclear over the past three decades. Many environmentalists remain sceptical about the sustainability of CFM. There are many laws that oppose CFM practices and law enforcement is also a significant obstacle. Hence, local people and hill tribes have to prove to the public that they can live subsistence lifestyles and at the same time conserve the forest and its function as an ecological system. Community rights have been re-established since the constitutional reform movement of 1997.

⁵ Office of Forest Land Management, Thai Royal Forest Department, *Forest Areas – Annual Report* (in Thai) (Bangkok: Thai Royal Forest Department, 2010) at 23.

⁶ Philip Hirsch, *Forest, Forest Reserve, and Forest Land in Thailand* (1990) 156:2 *The Geographical Journal* 166 at 169-170.

⁷ Asia Forest Network, *Community Forest Management in Thailand*, online: Asia Forest Network Organization <<http://www.asiaforestnetwork.org/tha.htm>>.

⁸ Philip Dearden, “Dern Sai Klang’: Walking the Middle Path to Conservation in Thailand” in Philip Dearden, ed., *Environmental Protection and Rural Development in Thailand: Challenges and Opportunities* (Bangkok: White Lotus, 2002) at 393-394.

⁹ Tim Forsyth & Andrew Walker, *Forest Guardians Forest Destroyers: The Politics of Environmental Knowledge in Northern Thailand* (Seattle: University of Washington Press, 2008) at 209.

¹⁰ Land use conflicts in Thai society stem from a variety of issues such as landlessness of farmers, land allocation, as well as from CFM. Understanding the causes and effects of the legal struggle for CFM would lead to more suitable land use management for CFM practitioners. The issue of land rights and CFM will be discussed in detail in sections 3.3.4 and 3.4.

People's participation in forestry management looks like a promising way to prevent deforestation in Thailand, as it helps reinforce the power of government agencies that have direct authority over forest conservation. In addition, the Thai *Constitution of 1997*,¹¹ the so-called "people's constitution", guarantees that traditional communities have rights to maintain their cultures and participate in natural resource management. The *Constitution of 2007*,¹² the current constitution, also guarantees these rights. Despite this, communities that practise CFM have been struggling to implement their constitutional rights.¹³

Although the "people's constitution" has been enacted, community forest management rights have still not been enforced. This is the result of statute law and its enforcement, and of a legal culture that ignores the community rights of the people. The forest as a natural resource is under the authority of the Ministry of Natural Resources and Environment of Thailand (MNRE) and its departments govern each type of forest area: the Royal Forest Department (RFD) governs national forest reserves and the Department of National Parks, Wildlife and Plant Conservation (DNWP) oversees national parks and wildlife sanctuaries. Any activity in forest areas, including CFM, that does not receive authorization from the RFD or the DNWP will be considered to be a violation of state forestry law.

The right to practise CFM is protected under the *Constitution*,¹⁴ which is the supreme law of the land, but it has not been upheld by the government officers who have direct authority. Instead, these officers use the state forestry law,¹⁵ which delegates power to manage forest areas to government agencies without people's participation. After the *Constitution* was enacted, some communities started to practise CFM and tried to enforce their constitutional rights directly. On the other hand, a majority of law enforcers still rely on statutory laws that provide more detail about law enforcement. Thus, because government officers mainly implement state forestry law, the practice of CFM is viewed as being in violation of the forestry

¹¹ *Constitution of the Kingdom of Thailand 1997*, trans. by Office of the Council of State, Royal Thai Government Gazette 55 (11 October 1997).

¹² *Constitution of the Kingdom of Thailand 2007*, trans. by International Foundation for Electoral System, Thailand and the Political Section and Public Diplomacy Office of the US Embassy, Bangkok, Royal Thai Government Gazette 124:47 (24 August 2007).

¹³ Further details will be discussed in section 3.3.1.

¹⁴ "Constitution" refers to both the *Constitution of 1997* and the current *Constitution of 2007*.

¹⁵ *Forest Act 1941*, Royal Thai Government Gazette 58 (15 October 1941) 1417; *National Park Act 1961*, Royal Thai Government Gazette 78:80 (3 October 1961) 1071/3; *National Forest Reserve Act 1964*, Royal Thai Government Gazette 81:38 (28 April 1964) 263; *Enhancement and Conservation of National Environmental Quality Act 1992* Royal Thai Government Gazette 109:37 (4 April 1992) 1.

laws. One solution that would help resolve the conflict between the *Constitution* and forestry law is to directly enact legislation about CFM. An attempt was made to do this via the *Community Forest Bill*. The RFD proposed the *Bill* as well as the people's version of the *Bill*.¹⁶ This debate and conflicts over *the Bill* continued for more than 10 years and this raises questions about the implementation of law regarding CFM and the extent of its conflicts with Thai legal mechanisms concerning constitutional law and statutory implementation. Local people, *Khon Muang*, and hill tribes in northern Thailand have had a long battle in the Thai legal system to preserve their community rights.¹⁷ In fact, they are still fighting for the implementation and protection of their community forest management practices.

As mentioned earlier, my hypothesis is that the modern Thai legal system is not compatible with CFM. CFM in Thailand, which is practised by the communities and government officers who participate in CFM, has struggled with Thai legal culture because legal professionals have failed to enforce CFM rights. In addition to the existence of a number of statutes that oppose community rights guaranteed by the *Constitution*, the legal culture in Thailand also fails to enforce community rights.

Embedded in this study are the ideas that the preservation and enhancement of community forests may help to resolve the problem of deforestation, and that the Thai *Constitution* can serve to protect the human rights of people who live in the forest as stewards. This means balancing community rights and the rights to self-determination of ethnic minorities with conservation of the ecosystem and biodiversity. However, CFM is not a "miracle medicine". Merely identifying communities as practising CFM might be misleading; actually, it is necessary to see whether the outcome of their ongoing practices is the revival of the forest and ecosystem. Ecological monitoring is therefore a basic principle that I wish to see happening within the structure of CFM, but it is beyond the scope of this study to prove that selected communities have succeeded in reviving the ecosystem and biodiversity. Hence, I would like to clarify that my focus is on the legal aspects of CFM. Specifically, I investigate how the practice of CFM is based on the legal consciousness of the selected CFM communities, how community CFM laws are applied and how they interact with state law, how government officers apply community and state law while interacting with CFM communities and, finally,

¹⁶ Issues concerning the *Community Forest Bill* will be discussed further in sections 3.3.3 and 3.3.4.

¹⁷ Chusak Wittayapak, "Community as a Political Space for Struggle over Access to Natural Resources and Cultural Meaning" in Philip Dearden, ed., *Environmental Protection and Rural Development in Thailand* (Bangkok: White Lotus, 2002) at 288.

how legal professionals implement the law concerning CFM. If we can understand community rights practices with regard to community forests and the causes of the struggle for implementation of these rights, this understanding should lead to better protection and enforcement of these rights under the *Constitution*. Hopefully, this will lead to more self-sufficient communities and preservation of the forests through designation of Protected Areas (PAs) and sustainable development.¹⁸

CFM practices have spread across Thailand where local people still rely on natural resources. Each form of CFM has its own characteristics; for example, CFM in the south is concerned with mangrove forests,¹⁹ while community forests are important to the peoples of the northeast.²⁰ This study focuses on the implementation of law concerning CFM in the north of Thailand, home to the hill tribes and Khon Muang.²¹ This area was chosen because of its unique legal history of interactions between the law of the commons, and state law, and because of the social contexts of the hill tribes and Khon Muang, whose cultures are based on living off the land. Moreover, I grew up and live in the north and am descended from Khon Muang, which helps me to understand the insider's view of Khon Muang culture and belief.

In the next section of Chapter 1, I will provide background information about the forest, people, laws and government policies concerning forest management in Thailand. I will then explain my study objectives in section 1.3. Following that, in section 1.4, I will discuss the methodology I used for conducting my field research and reviewing the selected case studies. Finally, I will provide a roadmap of this dissertation in section 1.5.

1.2 Background Information

In this chapter, I will provide background information that will lay the foundation for a detailed discussion of the law relating to CFM in Chapter 3. In this section, I will first describe the physical attributes and geography of the forest areas in northern Thailand, as well as the

¹⁸ The controversies surrounding people who live in forest areas and Protected Areas will be illustrated in section 1.2. This issue has become a main point of disagreement between state law and living law.

¹⁹ Yan Ta Khao Learning Centre, Trang Province, *Community Forest Management in the Mangrove Forest in Ban Tong Ta Se Community* (in Thai) (28 July 2011), online: Yan Ta Khao Learning Centre, Trang Province <<http://trang.nfe.go.th/nfe10/?name=news&file=readnews&id=166>>.

²⁰ Tenth Green Global Award, Thailand, *Green Global Award for Community Forest Management* (in Thai) (2008), online: Green Global Award, Thailand <<http://pttinternet.pttplc.com/greenglobe/2551/community-04.html>>.

²¹ "Khon Muang" means the local people in northern Thailand who speak the northern Thai dialect.

deforestation situation, along with management concepts relating to Protected Areas. Secondly, I will expound on the local people in the north of Thailand; “local people” in this study refers to both lowlanders, or Khon Muang, and highlanders, or hill tribes. The last section will provide an overview of the laws and government policies concerning forest lands and mountain areas.

1.2.1 The Forest in Thailand

This part will provide basic information about northern Thailand and will then focus on forest resources and management, from gathering geographic data and deforestation to the concept of Protected Areas (PAs). Thailand is a nation state that has a territory of 513,120 km², and is bordered by Burma and Laos in the north, Cambodia in the southeast, and Malaysia in the south.²² The northern landscape is mountainous: there are the parallel mountain ranges of Daen Lao Range Thanon Thong Chai Range in the west, and Khun Tan Range, Phi Pan Nam Range, and Luang Pra Bang Range in the east.²³ This high mountainous area produces river valleys and upland areas, creating a series of rivers, including the Nan, Ping, Wang, and Yom.²⁴ These mountainous and valley landscapes support various kinds of agriculture such as shifting cultivation and fruit farms in the highland areas and wet-rice farming in the valley areas. The upper northern region of Thailand consists of nine provinces: Chiang Rai, Chiang Mai, Nan, Payao, Prae, Mae Hong Sorn, Lumpang, Lumphun, and Uttaradit.²⁵

Forests in the north are classified as both evergreen and deciduous. In 1961, forests in Thailand spanned 273,627 km² or around 53.33% of land area in the country, while a survey in 2009 stated that the forest area had declined to 148,000 km² or only 29% of the land area.²⁶

²² Central Intelligence Agency, *The World Factbook: Thailand* (last updated 7 March 2012), online: CIA <<https://www.cia.gov/library/publications/the-world-factbook/geos/th.html>>.

²³ Kramon Tongthammachat, *et al.*, *Social Sciences Textbook* (in Thai) (Bangkok: Aksorncharoentat, 2005) at 24-25.

²⁴ *Ibid.*

²⁵ The Thai Royal Institute, “Geographical Regional Administration” (in Thai), online: Thai Royal Institute <<http://www.royin.go.th/th/knowledge/detail.php?ID=1378>>. Please note that regions are classified differently by different organizations. For example, the four-region classification comes from a former administrative unit used by the Ministry of the Interior, while geographical classifications divide Thailand into six regions. According to some classifications, the northern region is divided into the upper north and lower north regions. For others, the north of Thailand includes the Kamphaeng Phet, Phetchabun, Phicit, Phisanulok, Sukhothai, Uthai Thani, and Tak regions.

²⁶ Department of Local Administration, “Energy, Environment, and Natural Resources” (in Thai) (31 January 2010) 4:85 Department of Local Administration News 16.

Thailand has seen the highest rate of deforestation of all Southeast Asian countries for many decades.²⁷ In addition to deforestation, there is also degradation of forest biodiversity; wildlife endangerment, fire, drought, and soil erosion have all resulted from human activities in the forest.

One of the causes of deforestation in Thailand is the way in which the forest has been defined by the law. The Thai government enacted law defining the rural “forest” as land that no one had acquired according to forestry law.²⁸ Also, the government gazetted forest as forest reserves where, sometimes, local people already had villages. Thus, a forest area subject to the gazettement process does not reflect the real situation of deforestation and endangered biodiversity,²⁹ because data on forest areas, which are based on gazetted forests, might be increasing in document and legal status of the land while the real forest ecosystem might be decreasing. Hence, I compare the “forest areas” which are based on gazettement with aerial photographs that show a more realistic picture of forest areas.

Table 1 Forest Areas in RFD Region 1

(Chiang Mai, Lumphun, and Mae Hong Sorn)

(km ²)	Provincial Areas	Gazetted Forest Areas ³⁰	(%)	Forest Areas from Aerial Photographs ³¹	%
Chiang Mai	20,107	19,555	97.26	16,609.48	82.61
Lumphun	4,505.88	2,928.80	65.34	2,576.45	57.18
Mae Hong Sorn	12,681.26	11,181.64	87.69	11,267.70	88.85

²⁷ Hirsch, *supra* note 6 at 167; Royal Forest Department, Ministry of Natural Resources and Environment, “Forest Resources”, online: <http://www.thaienvimonitor.net/Database/forest.htm#forest5>.

²⁸ *Forest Act 1941*, *supra* note 15, s. 4(1).

²⁹ Earth Trends – Thailand Country Profile, “Biodiversity and Protected Areas – Thailand” *Earth Trends Environmental Information* (2003), online: World Resource Institute <http://earthtrends.wri.org/pdf_library/country_profiles/bio_cou_764.pdf>. “Higher plants” means embryonic plants or shoot-bearing plants.

³⁰ “Forest areas” here means those forest areas created via the Thai Royal Gazette as forest reserves, national parks, and wildlife sanctuaries. Source: Forest Management Division, Royal Forest Department (Region 1), Ministry of Natural Resources and Environment. Office of Forest Land Management, Royal Forest Department (Region 1), *Annual Report* (Chiang Mai: Office of Forest Land Management, RFD Region 1, 2011) at 36-42.

³¹ Source: Project on Production of Forest Areas from Aerial Photograph, Forest Management Division, Royal Forest Department (Regional 1), Ministry of Natural Resources and Environment (June 2010). *Ibid* at 43.

Source: Office of Forest Land Management, Royal Forest Department (Region 1), Ministry of Natural Resources and Environment ³²

I use examples from Forest Management Division, Region 1, for two reasons. First, it is the region in which the three selected communities in this study are located. Second, the systems of information in other regions do not provide the same systematic data as in Region 1; thus, in other regions, holistic information on forest areas in the north cannot be presented.³³

As shown in Table 1, the percentage of forest areas to the total area of PAs in each province is high. For example, in Chiang Mai, the forest area was said to comprise 97.26% of the whole province, although, in fact, the percentage of true biological forest there is not this high. Many gazetted forest areas are occupied by highland agriculturalists and are full of fruit trees such as longan and lichee, and of commercially grown flowers and cabbage.³⁴ The only official proof of forest land disputes that is legally accepted by dispute mediators is aerial photography maps and maps for military use, which show the actual geographic landscape and natural resources such as trees and other landmarks such as houses and roads. When gazetted forest areas are compared with aerial photographs of forest areas, the data show slight differences between the “legal” forest and the biological forest.

Many people lived in the “forest” in Thailand both before and after the land legally became “forest” through the gazetting process, and their activities have changed and become less sustainable over time. At first, Karen traditional cultivation in highland areas used rotation cultivation, which is considered as a sustainable method when practised by communities with low populations having vast areas of land that can be rotated.³⁵ However, when the situation changed due to intensive commercialized agriculture and lands were limited by the strict enforcement of PAs, intensive land use caused severe degradation of biodiversity and soil

³² *Ibid.* at 36-43.

³³ Currently in RFD organization, RFD has 13 regional offices and 6 subdivisions. In the upper north, there are 3 regional offices: Region 1 – Chiang Mai (Chiang Mai, Lumphon, and Mae Hong Sorn); Region 2 – Chiang Rai (Chiang Rai, Payao, and Nan); Region 3 – Lumpang (Lumpang, Prae, and Uttaradit). See Royal Forest Department, “Organization Chart” (in Thai), online: Royal Forest Department <http://www.forest.go.th/forestfarm1/farm/web/index2.php?option=com_organchart&view=organchart&Itemid=489&lang=th> .

³⁴ See Waranoot Tungittiplakorn, *Highland Cash Crop Development and Biodiversity Conservation: The Hmong in Northern Thailand* (Ph.D. Dissertation, Department of Geography, University of Victoria, 1998) [unpublished]; David Taylor, “Trade-Offs in Thailand” (1996) 104:12 *Environmental Health Perspectives* 1286.

³⁵ Philip Dearden, “Development, the Environment and Differentiation in Northern Thailand” in Jonathan Rigg, ed., *Counting the Cost: Economic Growth and Environmental Change in Thailand* (Singapore: Institute of Southeast Asia Studies, 1996) 111.

erosion.³⁶ With their growing populations and degraded natural resources, people who relied on the forests as their source of consumption did not receive enough food for themselves, either from their own cultivated rice or from hunting, and collecting forest products became rare. This situation resulted in shortening of the rotation circle, which caused rapid deforestation.³⁷

Human activities in the forest include logging, hunting, and cultivating. People who live in the forest use forest products such as firewood, mushrooms, wild animals, and timber.³⁸ In addition to communities who live in the forest, business entities are encroaching on forest areas, building resorts and creating fruit tree plantations. However, most of the damage from deforestation comes from illegal logging that is sometimes based on corrupt business practices.³⁹

Thailand began to grant logging concessions in 1896 and in September 18, 1896 it established the Royal Forestry Department (RFD),⁴⁰ the main purpose of which was to manage log extraction as a source of revenue for the Thai state.⁴¹ However, even with this new form of management, illegal logging was hidden behind logging permissions, and often loggers cut more trees than they were granted or logged outside approved areas. In January 1989, after severe flash floods in the south, the Thai royal government cancelled all logging concessions throughout the country. However, the same use and tenure of previously forested land continues.⁴² After the termination of logging licensing in Thai forest areas, illegal logging still continued, while cultivation in highland area became more widespread, along with more

³⁶ F. Renaud, H.-D. Bechstedt & Udomchai Na Nakorn, "Farming Systems and Soil-Conservation Practices in a Study Area of Northern Thailand" (1998) 18:4 *Mountain Research and Development* 345 at 345.

³⁷ Dearden, *supra* note 35.

³⁸ *Ibid.* at 114-115; Tungittiplakorn, *supra* note 34 at 148; Chumpol Maniratanavogsiry, *People and Protected Areas: Impact and Resistance among the Pgak'Nyau (Karen) in Thailand* (Ph.D. Dissertation, Department of Education, University of Toronto, 1999) [unpublished] at 101-108.

³⁹ Illegal loggers were arrested on the Thai-Burmese border in Mae Hong Sorn Province with 1,000 three-metre-long teak planks. See "Crackdown on Thai Loggers" *Bangkok Post* (29 January 2008). Former deputy forestry chief Prawat Thanadkha and a timber trader were sentenced to five years and two years in jail respectively for their parts in the 5,000,000 baht bribery case connected to the Salween illegal logging scandal in Tak from 1997 to 1998. See "Ex-Deputy Forestry Chief Gets Five Years" *Bangkok Post* (12 November 2005).

⁴⁰ Royal Forest Department, "History of Royal Forest Department", online: Royal Forest Department <http://www.forest.go.th/rfd/history/history_e.htm>.

⁴¹ Peter Vandergeest & Nancy Lee Peluso, "Genealogies of the Political Forest and Customary Rights in Indonesia, Malaysia, and Thailand" (2001) 60:3 *Journal of Asian Studies* 767.

⁴² David Taylor, "Trade-Off in Thailand" (1996) 104:12 *Environmental Health Perspectives* 1286.

trespassing in forest areas. Thailand needs more regulation to resolve its severe deforestation crisis. One concept that explains how the country can manage its natural resources is the concept of Protected Areas.

Due to considering the forest in Thailand as tropical rainforest that should be treated as a common heritage,⁴³ the International Union for Conservation of Nature and Natural Resources (IUCN) established guidelines for every country to manage their lands for certain purposes under the concept of "Protected Areas".⁴⁴ This concept refers to land or water that is designated for special objectives such as wildlife management, and the creation of national parks and historical sites; PAs also include community conserved areas.⁴⁵ The definition of a PA is "a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values."⁴⁶ The process of establishing PAs also varies by country and according to whether the PA is accepted by the IUCN or World Database on Protected Areas (WDPA). For example, PAs may be self-declared by aboriginal communities and subsequently recognized by the government,⁴⁷ or may be implied by specific binding commitments under customary law, covenants of NGOs, private trusts, or certification schemes.⁴⁸ In Thailand, as in many countries, the normal process to settle PAs is to gazette them by national statute.⁴⁹

⁴³ Warren Y. Brockelman, "Bioprospecting in Thai Forests: Is It Worthwhile?" (Paper presented to the International Conference on Biodiversity and Bioresources: Conservation and Utilization, Phuket, Thailand, 23-27 November 1997), online: International Union of Pure and Applied Chemistry <<http://old.iupac.org/symposia/proceedings/phuket97/brockelman.pdf>>.

⁴⁴ Nigel Dudley, ed., *Guidelines for Applying Protected Area Management Categories* (Gland, Switzerland: International Union for Conservation of Nature and Natural Resources, 2008) at x.

⁴⁵ *Ibid.* at 1.

⁴⁶ *Ibid.* at 8.

⁴⁷ An example is the Anindilyakwa Indigenous Protected Area (IPA) on the Groote Eylandt Peninsula, Gulf of Carpentaria (near Darwin, Australia); see "Anindilyakwa Indigenous Protected Area" Department of Sustainability, Environment, Water, Population and Communities, online: Government of Australia <<http://www.environment.gov.au/indigenous/ipa/declared/anindilyakwa.html>>.

⁴⁸ An example of a community conserved area is the Nabanka Fish Sanctuary in the Philippines, and an example of a PA created by a private trust or company is Port Susan Bay Preserve on Puget Sound in Washington State. See Dudley, *supra* note 44 at 8.

⁴⁹ The Thai government uses the gazetting process to designate forest reserves, national parks, wildlife sanctuaries, and non-hunting areas; see more details in section 2.2.3. It also uses a certification scheme: the Director of the RFD, under its Community Forest Division, grants a certificate to each community that attends a community forest management project within a period of five years. See more details in section 2.3.2.

PAs can be categorized into six types: I) strict protection (including I(a) – strict nature reserve and I(b) – wilderness area); II) ecosystem conservation and protection (i.e. national parks); III) conservation of natural features (i.e. natural monuments); IV) conservation through active management (i.e. habitat/species management areas); V) landscape/seascape conservation and recreation; and VI) sustainable use of natural resources (i.e. managed resource protected areas).⁵⁰ The ways to manage PAs are also various. For example, areas may be left untouched so that nature can recover itself or traditional methods may be used, such as sustainable conservation practices.⁵¹ How PAs are classified depends on objectives and management, so that the common name of a place may not reflect the real category of a PAs.⁵² Settlement of PAs should be conducted according to the principles of good governance and the values of the people who are stakeholders; and management of PAs should also be opened to indigenous peoples and local communities for practical reasons.⁵³ Principles of PAs governance include legitimacy, establishing management by collective agreement, effective performance, accountability, and transparency.⁵⁴ These principles should apply to governments and communities who participate in PAs.

There are significant reasons for every society to keep some places as PAs for the interest of present and future generations.⁵⁵ Such PAs are created to keep lands away from the normal market allocation process in order to avoid brutally compromised and irreversible conditions. Therefore, through processes such as public participation and legislation, society regulates human activities concerning permissible and non-permissible uses of PAs. Each of these PA categories is based on different values that might serve more than one purpose at a time.⁵⁶ When society changes with increasing population and environmental exploitation, management of PAs needs to adjust to protect biodiversity and endangered species that need a

⁵⁰ Dudley, *supra* note 44 at 4.

⁵¹ An example of such practices can be found in India's Kaziranga National Park, where invasive species are removed; in Archipelago National Park in Finland, traditional farming methods are used to maintain special species. See *ibid.* at 8.

⁵² These following are examples of various categories of PAs that are called "national parks": Dipperu National Park in Australia = I(a); Guanacaste National Park in Costa Rica = II; Yozgat Camligi National Park in Turkey = III; Pallas Ounastunturi National Park in Finland = IV; Snowdonia National Park in Wales, UK = V; and Expedition National Park in Australia = VI; *ibid.* at 11.

⁵³ *Ibid.* at 28.

⁵⁴ *Ibid.*

⁵⁵ Dearden, *supra* note 8 at 378-381.

⁵⁶ Philip Dearden, "Park Literacy and Conservation" (1995) 9:6 Conservation Biology 1654 – 1656.

place in society no less than humans.⁵⁷ Regarding PAs in Thailand, the crucial question is how society balances the importance of preserving forest PAs with the need to use natural resources wisely for present and future generations. Thailand has enacted gazetted forest areas in five forms: forest reserves (1,221 gazetted forest areas);⁵⁸ national parks (148 areas);⁵⁹ forest parks (112 areas);⁶⁰ wildlife sanctuaries (57 areas); and non-hunting areas (56 areas)⁶¹. According to the IUCN categories, PAs in Thailand are classified as follows: wildlife sanctuaries – I; national parks – II; forest parks – V; and non-hunting areas – VI.⁶² Forest reserves are not mentioned in any PA categories. Although the number of PAs in Thailand may suggest that many areas have been designated, the management of these PAs is different from the IUCN guidelines and does not reflect the reality in the forest areas. For example, there should be no activities in national parks (category II) that will disrupt nature but, in fact, national parks in Thailand are treated as recreation areas where people are allowed to stay and during peak season these places are full

⁵⁷ Dearden, *supra* note 8 at 382.

⁵⁸ Royal Forest Department, "List of Forest Reserves", online: Royal Forest Department <http://forestinfo.forest.go.th/55/National_Forest.aspx>.

⁵⁹ Department of National Parks, Wildlife and Plant Conservation, "List of National Parks", online: Department of National Parks <<http://web3.dnp.go.th/parkreserve/nationalpark.asp?lg=2>>.

⁶⁰ Department of Department of National Parks, Wildlife and Plant Conservation, "List of Forest Parks", online: Department of National Parks <<http://web3.dnp.go.th/parkreserve/park.asp?lg=2>>.

⁶¹ Wildlife Conservation Office, Department of National Parks, Wildlife and Plant Conservation, "Non-Hunting Areas in Thailand" (in Thai), online: Department of National Parks <http://www.dnp.go.th/wildlifednp/index.php?option=com_content&view=article&id=27&Itemid=30>.

⁶² International Centre for Environmental Management, *Thailand National Report on Protected Areas and Development: Review of Protected Areas and Development in the Lower Mekong River Region* (Queensland, Australia: ICM, 2003) [ICEM] at 58.

According to the IUCN guidelines on PA categories:

wilderness areas (category I(b)), are usually large unmodified or slightly modified areas, that have managed to preserve their natural character without significant human habitation. National parks (category II), are large natural areas that are set aside to protect large-scale ecological processes, along with species and ecosystems, which provide a foundation for environmentally and culturally compatible spiritual, scientific, educational, recreational and visitor opportunities. Protected landscapes (category V), are areas where the interaction of people and nature over time has produced areas of distinct character with significant ecological, biological, cultural and scenic value, and where safeguarding the integrity of this interaction is vital to protecting and sustaining the area and its associated conservation and other values. Protected areas with sustainable use of natural resources (category VI) are areas in which ecosystems and habitats are preserved, together with associated cultural values and traditional natural resource management systems. They are generally large, with most of the areas in a natural condition, where a proportion is under sustainable natural resource management and where low-level non-industrial use of natural resources compatible with nature conservation is seen as one of the main aims of creating the area.

Category VI seems to fit with the concept of CFM.

of people looking for affordable holidays. Many forest areas are inhabited; however, some resident communities carry out activities such as farming in the mountain areas, while some communities try to practise CFM. The process of clarifying the right of communities to live in forest areas before the gazetting process is very slow due to lack of government funds. New forest trespassing in gazetted areas is also a continuing threat. Thus, designating PAs hardly stop biodiversity degradation in Thailand, suggesting that a more effective forest conservation system might be needed to slow down degradation.

In fact, PAs management in Thailand is not effective enough to preserve the flora and fauna in many gazetted national parks and wildlife sanctuaries.⁶³ Increasing population, expansion of cash cropping, migrating forest frontier areas, and commercial logging have all degraded PAs.⁶⁴ In addition, PAs have become segmented into small isolated pieces of forest which cannot sustainably support large animals. Mainly, deforestation comes from lack of awareness and knowledge of forest ecosystems. Many endangered animal species in Thailand have not been found in the wild for a long time, while many species of wild plants have essentially disappeared – especially wild orchids.⁶⁵

As described in the background information about the forest situation in northern Thailand, forest conservation relies on society, especially on the people who live in or near forest areas. The next section will depict the people who live in the north and are involved in forest areas – people who could be forest destroyers or forest protectors.

1.2.2 Local People: Khon Muang and Hill Tribes

The total population of Thailand was approximately 63,878,267 in 2010. In the northern region, the population was approximately 6,133,989 and in Chiang Mai the population was 1,640,479 at its highest.⁶⁶ According to a 2003 Royal Forest Department (RFD) survey, more

⁶³ *Ibid.* at 27.

⁶⁴ *Ibid.* at 31.

⁶⁵ Office of Natural Resources and Environmental Policy and Planning, *Thailand: National Report on the Implementation of the Convention on Biological Diversity* (Bangkok: Ministry of Natural Resources and Environment, 2009) at 16-17. Thai endangered species such as kouprey, Eld's deer and Java rhinoceros have disappeared a long time ago, while others have declined, such as the gaur, banteng, wild buffalo, and tiger.

⁶⁶ The Bureau of Registration Administration, Department of Provincial Administration, Ministry of Interior, "Announcement of The Bureau of Registration Administration on Provincial Population of 2010" (in Thai) (4 February 2011), online: Bureau of Registration Administration <http://stat.bora.dopa.go.th/stat/pk/pk53/pk_53.pdf>.

than 500,000 people were estimated to live in PAs such as national parks and wildlife sanctuaries, with a total of 5,000,000 people living inside all categories of PAs. The RFD documented that 462,450 communities live in forest areas of 16,000 km².⁶⁷ In 2002, the Thai government estimated the hill tribe population to be approximately 925,825 across the northern and western provinces.⁶⁸ In my study, I will use the term “local people” to refer to both the lowlanders and highlanders who live in the north of Thailand.

Lanna was an ancient city located in what is now the northern provinces of Thailand: Chiang Mai, Chiang Rai, Lumpang, Lumphun, Payao, Prae, Nan and Mae Hong Sorn.⁶⁹ The Lanna Kingdom was founded in 1281 by King Mangrai.⁷⁰ The original groups who dominated this area were the Tai Yuan, Tai Lü, and Tai Yong.⁷¹ They called themselves “Khon Muang”, which literally means “people who live in the city”, but the name was intended to distinguish the people who spoke the northern Thai dialect and lived in Lanna from people who lived in the lower Chao Phraya basin. In the colonial period beginning in 1824, the British came to Burma,

⁶⁷ ICEM, *supra* note 62 at 113.

⁶⁸ Network of Indigenous Peoples in Thailand, *Report on the Situation of Human Rights and Fundamental Rights of Indigenous Peoples in Thailand*, submitted to James Anaya, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples (19 January 2010), Chiang Mai, Thailand, online: Asia Indigenous Peoples Pact Network <<http://www.aippnet.org/pdf/Thai%20IPs%20submission%20to%20the%20Special%20Rapporteur%20010.pdf>>. Please note that this information comes from the Thai Department of Social Development and Welfare on “hill tribe” populations and recognizes only nine hill tribes. Thus, it does not include the Malabri, Palong, Kachin, Tai Yai, Haw, and Mon, which the government classifies as “minority” groups and anthropologists view as “ethnic” groups. Currently, the Thai government classifies people who live in the mountain areas as “highlanders”. After reorganizing several times, the Tribal Research Institute was merged into the Department of Social Development and Welfare and the government unit that directly focused on ethnic groups eventually disappeared. The Social Welfare Unit only focused on issues of women, children, the elderly, and the disabled. However, the government founded a research institute on ethnic groups as part of the Sirinthorn Anthropology Centre, which focuses on selective research on many groups, but there is still no government unit that collects and follows up data on the total population of each ethnic group in each province. This is the result of problems in bureaucratic management.

⁶⁹ See Sarasawadee Ongsakul, *History of Lanna* (in Thai) 6th ed. (Bangkok: Ammarin, 2007).

⁷⁰ Michael Freeman, *Lanna: Thailand's Northern Kingdom* (London: River, 2001) at 11.

⁷¹ Lucien M. Hanks, “The Yuan or Northern Thai” in John McKinnon & Wanat Bhruksasri eds., *Highlanders of Thailand* (Kuala Lumpur: Oxford University Press, 1983) 101, at 101. I notice that several Tai groups have embedded into Khon Muang, such as Tai Khuen, Tai Lue and Tai Yong, because they have already blended in the city and live a modern/northern Thai lifestyle combined with their own traditions and beliefs. For example, on my father’s side, my great-grandfather was Khamu and my great-grandmother was Tai Yuan, and on my mother’s side, my great-grandparents were Tai Yong, so I just consider myself to be Khon Muang and hold some northern beliefs such as the belief that a couple should stay in woman’s house after marriage, and that maintaining a spirit house for ancestors should follow the female line.

while Siam extended its control over Lanna. Finally, Lanna was merged with Siam over time, from 1893 until it became completely under Siamese control in 1904.⁷²

The Thai government categorizes hill tribe peoples who live in Thailand into 11 tribes: Karen, Hmong, Mien, Akha, Lahu, Lisu, Lua, Htin, Khamu, Tung Su, and Malabree.⁷³ These ethnic groups can be classified according to language, religion, tradition, and social structure.⁷⁴ They generally build their communities in the mountains, and have their own ways of living as distinguished from those of other Thai people.⁷⁵ Settlement by Lua people was widespread throughout the lowland areas, with the Lua merging into the Khon Muang.⁷⁶ The Khamu came from Laos and stayed in the lowland and hill areas and adopted Thai culture. The Karen have lived in the hill areas close to the Burmese border for more than 300 years. Other ethnic groups such as the Lahu, Lisu, and Akha moved down from southern China approximately 100 years ago, while the Hmong and Mien migrated from southern China and Laos 200 years ago.⁷⁷ The Karen, Lahu, Lisu, Akha, Hmong, and Mien have mainly settled among their own groups and maintain their traditions.

Both the Khon Muang in the lowlands and the hill tribes in the highlands still rely on agriculture in the fertile valleys of the Ping, Wang, Yom, and Nan Rivers.⁷⁸ In rural areas, the lifestyles of the local people of Lanna are based on community, irrigation systems and forest

⁷² Freeman, *supra* note 70 at 15.

⁷³ Office of Hill Tribes' Welfare, Department of Public Welfare, Ministry of Labour and Social Security, *Highland Communities in Thailand* (in Thai) (Bangkok: Office of Hill Tribes' Welfare, Department of Public Welfare, 1995).

However, note that other organizations may classify ethnic groups in Thailand differently. For example, The Bureau of Registration Administration, Department of Provincial Administration, Ministry of Interior (2001) defines hill tribe ethnic minorities as "ethnic groups who originally lived in the highland area in Thailand or have ancestors who lived in the highland area in Thailand, and have unique cultures, customs, beliefs, languages, and life styles."

⁷⁴ James A. Matisoff, "Linguistic Diversity and Language Contact" in John McKinnon & Wanat Bhruksasri, eds., *Highlanders of Thailand* (Kuala Lumpur: Oxford University Press, 1983) 56 at 65-66.

⁷⁵ Pitidhama Titimontri, "Integrated Rural Development in the Highlands and National Security Resolutions Concerning Hill Tribe Peoples and Opium Plantation", (1994) Document No. 2-04-2537, Office of the Narcotics Control Board of Thailand at 1.

⁷⁶ Peter Kunstadter, "Highland Population in Northern Thailand" in John McKinnon & Wanat Bhruksasri, eds., *Highlanders of Thailand* (Kuala Lumpur: Oxford University Press, 1983) 15 at 28.

⁷⁷ *Ibid.*

⁷⁸ In the 17 provinces in the north of Thailand, land use surveys have shown that agricultural areas made up 36% of the land area, while the percentage of forest areas was 56%. See the Office of Soil Surveys and Land Use Planning, Land Development Department, "Land Use in Thailand in 2008-2009" (in Thai), online: Land Development Department <http://olp101.ldd.go.th/luse1/luse_product51-52.htm>.

use are communal. The local people live close to the forest and use it, for example, for logs and non-timber products. After the RFD established and expanded restricted areas, the food security and household food supply of the local people were affected.⁷⁹ In the past, local people used to exploit the forest by burning logs to make charcoal for their own consumption and to sell. But after the forest became depleted, they returned to try to conserve their forest lands.⁸⁰ In addition, local people carefully guard their forests from outsiders, to prevent illegal logging and theft of timber and other forest products, such as mushrooms.⁸¹

People who live in the upland areas of northern Thailand have various patterns of settlement and cultivation systems that can be described as falling into three patterns according to land use and relationships between cultivation and fallow periods.⁸² The first pattern, short cultivation or short fallowing, is normally used by Khon Muang or northern Thai. After they cultivate for a short period of time, they use a short fallow period. As this pattern does not allow the soil to rest long enough to replenish itself, irrigation systems are required. This type of cultivation occurs in the foot hills and in the terraced lands between valleys at elevations of between 300 and 600 metres.⁸³ People using this cultivation system normally plant rice and cash crops such as vegetables and beans.

The second pattern is short cultivation with a long fallow period and is normally practiced by Lua and Karen around the upper terraces and in the foothills at ranges of approximately 700 to 1,000 metres.⁸⁴ The cultivation time in one area was one year, then the land was left for a six- or seven-year fallow period before farmers came back to the same area again. Crops that

⁷⁹ Jiranuch Kong-ngern, *Community Forestry Management of Rural Communities* (in Thai) (M.Ed. Thesis in Non-formal Education, Chiang Mai University, 2002) [unpublished].

⁸⁰ An example can be found in Ban Tung Yao, Tambon Sribuaban, Amphoe Muang Lampun, Lampun Province, where villagers who experienced deforestation subsequently learned to conserve their forest resources. See Jantana Suttijaree, *An Economic Analysis of Forest Management by Community* (in Thai) (M.Econ. Thesis, Chiang Mai University, 1996) [unpublished].

⁸¹ An example can be found in Ban Tung Yao, where villagers involved in community forest management, especially women, showed that external forces such as economic hardship changed villagers' roles by increasing concern to utilize forest products wisely for daily consumption. See Wiset Sujinpram, *Women's Movement in Public Space for Community Forest Management in Lamphun* (in Thai) (M.A. Thesis in Social Development, Chiang Mai University, 2001) [unpublished].

⁸² Peter Kunstadter & E.C. Chapman, "Problems of Shifting Cultivation and Economic Development in Northern Thailand" in Peter Kunstadter, E. C. Chapman & Sanga Sabhasri, eds., *Farmers in the Forest* (Honolulu: East - West Center, 1978) 3 at 7.

⁸³ *Ibid.*

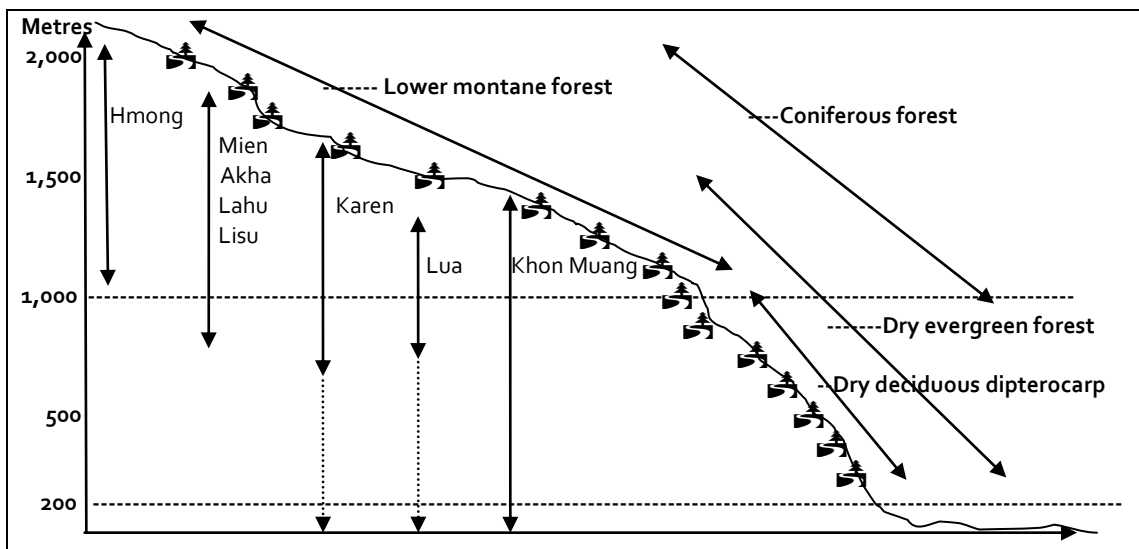
⁸⁴ *Ibid.* at 9.

are normally planted using this cultivation system are rice, chilies, beans, herbs, and corn, and all plants are planted together in the same fields.

The third pattern is long cultivation with a very long fallow period, which is normally used among the Hmong, Mien, Lahu, Lisu, Akha, and Yunnanese Chinese (Haw) at elevations of about 1,200 to 1,500 metres.⁸⁵ This cultivation system uses the land for long period of time, more than five years, and then leaves that land fallow when the soil becomes infertile. The main crops that are planted using this system are corn, rice, and other cash crops, and opium before it was banned.

After opium was banned, cash crops were introduced as a replacement for opium in the highlands. Cash crops such as cabbage, beans and cut flowers were promoted as royal projects; meanwhile, private companies promoted corn and soybeans to farmers, and this led to intensive cultivation. The cultivation of fruit trees such as peaches, oranges and lychees became increasingly important in the high elevation areas where opium was once grown. Similarly, in the foot hills, the cultivation of fruit trees such as longans also expanded.⁸⁶

Figure 1 Land forms and land-use systems in northern Thailand⁸⁷



As shown in Figure 1, each group normally cultivates at varying elevations. Each tribe has its own pattern of livelihood, which might be based on either subsistence or commercial

⁸⁵ *Ibid.* at 10.

⁸⁶ Kasikorn Research Centre, "Information on Major Agricultural Products" (in Thai) *K-Econ Analysis* (24 June 2008), online: Kasikorn Research Centre <<http://www.kasikornresearch.com/TH/KEconAnalysis/Pages/Search.aspx?cid=263>>.

⁸⁷ Kunstader & Chapman, *supra* note 82 at 8.

cultivation. Karen and Lua are primarily subsistence-based groups.⁸⁸ Both hill tribes live in a simple way and maintain their traditions and cultures. They plant crops, raise domestic animals, and harvest their food from the forest by gathering, fishing and hunting, and believe that they should preserve the forest respectfully.⁸⁹ Traditionally, Karen hill tribes have been self-sufficient and have maintained a harmonious relationship between their lands and their livelihood.⁹⁰

In contrast with the Karen and Lua, the Hmong's cultivation system requires more intensive use of the forest for cash crops and hunting.⁹¹ The Hmong have adjusted very well to trade and a commercially-based livelihood, having taken on many development projects that were introduced as a replacement for opium cultivation.⁹² The tendency of Hmong to adapt well to capitalism has rapidly catalyzed forest utilization. In addition, the cultivation system in the highlands has changed since development came to the hill tribes. Expansion has happened in every dimension: expansion of the land base, lengthening of the cultivation period so that the soil has less time to recover, and an increase in intensive cash cropping, which requires more fertilizers and pesticides.⁹³

In terms of hunting, some hill tribes believe that animals have spirits and do not kill certain species.⁹⁴ For instance, some Karen communities believe that killing gibbons is taboo.⁹⁵ Nevertheless, in the past, hunting permitted animals provided a main source of nutrition. Unfortunately, because of current biodiversity degradation and increased population, it is no longer possible to rely on hunting as a main source of food,⁹⁶ although hunting is still practised.

⁸⁸ Peter Kunstadter, "Subsistence Agricultural Economics of Lua' and Karen Hill Farmers, Mae Sariang District, Northwestern Thailand" in Peter Kunstadter, E. C. Chapman & Sanga Sabhasri, eds., *Farmers in the Forest* (Honolulu: East - West Center, 1978) 74 at 81.

⁸⁹ Khajatpai Burutpat, *Hill Tribe People* (Bangkok: Praepittaya, 1995) at 14-19; Kaunchewan Buadeang, "Changing Livelihoods of Karen Communities: A Case Study in Villages of the Mae Cheam District" (Chiang Mai: Social Research Institute of Chiang Mai University, 1998) at 14-15.

⁹⁰ Buadeang, *ibid.* at 34-38.

⁹¹ F.G.B. Keen, "Ecological Relationships in a Hmong (Meo) Economy" in Peter Kunstadter, E. C. Chapman & Sanga Sabhasri, eds., *Farmers in the Forest* (Honolulu: East - West Center, 1978) 210 at 212.

⁹² Tungittiplakorn, *supra* note 34 at 137-140.

⁹³ Peter Kunstadter, "Alternatives for the Development of Upland Areas" in Peter Kunstadter, E. C. Chapman & Sanga Sabhasri, eds., *Farmers in the Forest* (Honolulu: East - West Center, 1978) 289 at 300.

⁹⁴ Tungittiplakorn, *supra* note 34 at 148-149.

⁹⁵ Interview with villagers in Ban Huayeikhang, Mae Wang District, Chiang Mai Province (21 October 2010).

⁹⁶ Dearden, *supra* note 35.

Hunting traditions differ among hill tribe communities. For example, the Lahu are well known as hunters, while the Karen, Lisu, and Mien only hunt when they have spare time from cultivation.⁹⁷ The Hmong believe that the dead can be reborn as animals, so that they do not kill wild animals except when necessary, such as in self-defense and to protect their crops.⁹⁸ However, Hmong sometimes trade wildlife with lowlanders.⁹⁹

Despite increasing commercialism, local people in the north still maintain their traditional religious beliefs and knowledge about natural resources.¹⁰⁰ Mostly, local people in the north still believe in nature spirits, which are believed to provide spiritual protection; for example, these spirits may inhabit large trees and headwaters.¹⁰¹ Some hill tribes have converted to religions such as Christianity and Buddhism, but they merge these new beliefs with their traditional religious views.¹⁰² Their social structures are based on kinship, especially extended families, and remain family-bound. Particularly, hill tribes in the highlands stay within their groups, and retain social control among themselves.¹⁰³

The forest is life for the hill tribe peoples. It is shelter and also the main source of food. Biodiversity plays a major role in their sustainable livelihoods. Hill tribes grow rice and collect non-timber products for their domestic consumption and trade.¹⁰⁴ Hunting and domestic animals are sources of their daily diet.¹⁰⁵ However, the growing population, the development projects promoting cash crops, the cultural movement away from sustainable living, and illegal logging all lead to erosion of biodiversity in the forest as well as degradation of food resources for people who rely on the forest.¹⁰⁶ In turn, the collapse of biodiversity causes significant

⁹⁷ Tungittiplakorn, *supra* note 34 at 151, 157 and 160.

⁹⁸ *Ibid.* at 162-163.

⁹⁹ *Ibid.* at 164.

¹⁰⁰ See Apai Wanishpradist, *Dynamics of Local Knowledge as a Practice of Claiming Resource Rights in the Highlands: A Case Study of the Hmong Mae Sa Mai Community in Mae Rim District, Chiang Mai Province* (in Thai) (M.A. Thesis in Social Development, Chiang Mai University, 2003) [unpublished].

¹⁰¹ *Ibid.* at 227.

¹⁰² Interview with villagers in Ban Khunte, Jomthong District, Chiang Mai Province (1 November 2010).

¹⁰³ See Monthian Sanghgoen, *Social Control of Hilltribe Communities* (in Thai) (M.Ed. Thesis in Non-formal Education, Chiang Mai University, 2001) [unpublished].

¹⁰⁴ John McKinnon & Bernard Vienne, *Hill Tribes Today* (Bangkok: White Lotus-Orstom, 1989).

¹⁰⁵ Philip Dearden, "Development, the Environment and Social Differentiation in Northern Thailand" in Jonathan Rigg, ed., *Counting the Costs: Economic Growth and Environmental Change in Thailand* (Singapore: Institute of Southeast Asian Studies, 1996) 111 at 114-115.

¹⁰⁶ *Ibid.* at 116-118.

damage to hill tribes' subsistence lifestyles. A vicious cycle of degradation of the forests and sustainability occurs. As a result of deforestation and the struggles of local people who rely on the forest, the Thai government has tried to resolve these problems. The next section will illustrate laws and policies that the government has launched in response to the crisis in the forest.

1.2.3 Laws and Policies Concerning Forest Lands and Highlanders

Four main government agencies have jurisdiction over land management, including forest lands: the Ministry of Natural Resources and Environment (MNRE), the military, the Ministry of the Interior, and the Ministry of Agriculture and Co-operatives. These four government agencies respond separately to the problems of deforestation, land rights, and hill tribes.

The first, the Ministry of Natural Resources and Environment, has direct authority over forests and has many departments that oversee natural resources in the forest areas, for example: the Royal Forest Department (RFD); the Department of National Parks, Wildlife and Plant Conservation (DNWP); and the Department of Water Resources. The Thai government implements its laws through these agencies to preserve the forest and biodiversity, and also manages natural resources in the public interest. Primarily in gazetted forest areas, such as national parks and national forest reserves, the law has forbidden any harmful act that might threaten biodiversity, such as clearing and burning, collecting forest products, and herding cattle or other animals inside the PAs in accordance with the guidelines set out by the International Union for Conservation of Nature and Natural Resources (IUCN).¹⁰⁷ Moreover, permission is required to enter PAs such as wildlife sanctuaries. According to the law, it is clearly illegal to be resident in forest areas such as national parks and wildlife sanctuaries. However, the process of consulting stakeholders under the IUCN guidelines is often difficult because there have been communities living in these areas before they were gazetted, and in such cases the government has to investigate the rights of these communities, which creates delays due to budgetary limitations.

Secondly, the military is involved because of national security concerns, especially along the border. Further, the tasks of the military include establishing schools in remote areas for hill tribe peoples, and serving environmental conservation directly by carrying out royal

¹⁰⁷ Dudley, *supra* note 44; see also ICEM, *supra* note 62.

projects. The military also plays a double role regarding hill tribes' livelihoods in the forest.¹⁰⁸ As the priority of the military is national security, it keeps in contact with the hill tribes who live in the sensitive areas along the border and tries to stop the hill tribes from growing opium. The military's second role is to provide education and to promote "Thainess" to the hill tribes under the policy of "integration" of hill tribes.¹⁰⁹

Other agencies involved are the Department of Local Administration, and the Department of Provincial Administration, both in the Ministry of the Interior. The Ministry of the Interior is involved because its local authorities establish villages, register households, and administer the population in their areas, including in the forest areas.¹¹⁰ These agencies usually support hill tribe peoples because they facilitate infrastructure for the people.¹¹¹ Moreover, their actions seem to encourage community forest management by approving community forest committees at the local level.

The fourth agency concerned is the Agricultural Land Reform Office (ALRO or Sor Por Kor),¹¹² and the Department of Agricultural Extension in the Ministry of Agriculture and Co-operatives which can grant land rights (Sor Por Kor 4-01) to poor and landless farmers who need farm land.¹¹³ Normally, deteriorated forest areas are subject to transfer from RFD to ALRO. Hill tribe peoples also can be granted Sor Por Kor 4-01 certificates if they have Thai citizenship. Disputes over territory between the RFD and ALRO often occur. In addition, even in the forest areas, hill tribes engaged in shifting and rotational agriculture are frequently encouraged by government agencies like the Department of Agricultural Extension and

¹⁰⁸ Chupinit Kesmanee, "Dubious Development Concepts in the Thai Highlands: The Chao Khao in Transition" (1994) 28 *Law & Society Review* 676, at 680; see also the IUCN news story, "Doing It Differently in Thailand" (1 August 2011), online: International Union for Conservation of Nature <http://iucn.org/knowledge/focus/from_the_karakorum_to_kalimantan/on_the_ground/?7961/Doing-it-differently-in-Thailand>.

¹⁰⁹ Kesmanee, *ibid* at 682-683.

¹¹⁰ Hirsch, *supra* note 6 at 169.

¹¹¹ Paul Francis, "Where There Is Thunder There Should Be Rain: Ethnic Minorities and Highland Development in Northern Thailand" (2004) 24:2 *Mountain Research and Development* 120.

¹¹² Sor Por Kor is the acronym for this office in Thai and this acronym is also used as a name for land documents in the scheme of land allocations for agriculture, which this office issues to farmers as part of the agricultural land reform project.

¹¹³ According to the *Agricultural Land Reform Act 1975*, section 39, the land rights granted by the ALRO cannot be divided or transferred to others, except through inheritance by descendants or transfer to farmers' institutions or the ALRO.

Highland Research and Development Institute (HDRI)¹¹⁴ to produce more agricultural products.¹¹⁵

These government agencies come to the forest areas to support poor people living in the forest, and to serve as welfare agents for poor people, but there are also downsides to the involvement of these agencies, both to forest people and biodiversity. For example, promotion of cash crops to the highlanders has led to rapid degradation of biodiversity.¹¹⁶ The work of these agencies often conflicts with the work of other agencies.¹¹⁷ These conflicts affect hill tribe peoples directly, impacting their sustainable development.

To illustrate these points, I will briefly introduce four government policies that directly affect the forest and people who practise CFM. I will also discuss these policies in detail in Chapter 3. The first policy is the RFD's policy to provide certificates to the communities who apply for CFM projects in the forest reserves through the Community Forest Management Bureau.¹¹⁸ This RFD policy about CFM in forest reserves was created at the same time as the people's CFM movement was gaining ground in all kind of forest areas, before the *Constitution of 1997* was enacted.

The second policy, adopted by cabinet resolution, allows people who were living in PAs – national parks and wildlife sanctuaries – before the gazetting process to continue living on their

¹¹⁴ The Highland Research and Development Institute (HDRI) is public organization established by royal decree in 2005 to support Royal Projects in highland areas (mountain areas or regions more than 500 metres above sea level). The work of this institute is concerned with 20 provinces: eight provinces in the upper north (except Uttaradit) and Tak, Phetchabun, Phisanulok, Loei, Sukhothai, Kamphaengphet, Uthaitani, Kanchanaburi, Suphanburi, Ratchaburi, Phetchaburi, and Prachuap Khiri Khan. Currently, HDRI is one of the government organizations that maintains data on people in the highlands, including a population database. See *Royal Decree to Establish Highland Research and Development Institute (Public Organization) 2005*, Royal Thai Government Gazette 122: 95 (14 October 2005).

According to the HDRI website, the highlander population in the 20 provinces listed above is as follows:

Karen – 369,388; Hmong – 115,243; Mien – 29,423; 44,495; Lahu – 67,619; Lisu – 23,439; Lua – 49,510; Palong – 1,380; Tai Lue 5,373; Haw – 11,561; Shan – 16,116; Mon – 15,010; Kachin – 77; and Thai – 203,999.

Source: Highland Research and Development Institute (Public Organization), Management Information System, "Population of Highlanders in 20 Provinces: Classification of Ethnic Groups" (in Thai), online: HRDI <http://mis.hrdi.or.th/highlandII/Source/highlandsurvey/report/4_ReportOverall_Ethnology.aspx>.

¹¹⁵ Peter Vandergeest & Nancy Lee Peluso, "Territorialization and State Power in Thailand" (1995) 24:3 *Theory and Society* 412.

¹¹⁶ Philip Dearden, "Development and Biocultural Diversity in Northern Thailand" (1995) 15:4 *Applied Geography* 333 at 336.

¹¹⁷ Dearden, *supra* note 105 at 119.

¹¹⁸ Community Forest Management Bureau, Royal Forest Department, online: Government of Thailand <http://www.forest.go.th/community_forest/>.

lands and also stays prosecutions for “forest trespassing” (i.e. by hill tribe members) until the right to stay in the forest has been investigated and proved.¹¹⁹

The third policy is contained in the cabinet resolution (3 October 2010) on the restoration of Karen culture that was initiated by Princess Maha Chakri Sirindhorn Anthropology Centre, and proposed by the Ministry of Culture.¹²⁰ This is a pilot project to restore ethnic groups’ cultures. This cabinet resolution has important effects on Karen people who live in the forest area and supports the practice of rotation cultivation. Many ministries, such as the Ministry of Interior and Ministry of Natural Resources and Environment, are involved in allowing Karen communities who lived in forest areas before they were gazetted to remain in these areas. Karen people are also permitted to maintain their culture and to practice sustainable forms of rotation cultivation. If this cabinet resolution helps to restore Karen culture, the government will continue this policy with other ethnic groups.

The last policy is communal land title.¹²¹ This policy was created in response to the landless farmers’ movement to acquire farm land. To ensure that the land will not be transferred and the farmers will not become landless again, the policy has established non-transferable, communal lands and authorizes the community to manage these lands. This concept mainly applies to public land, including forest areas, which are subject to land rights disputes. This policy is important to CFM because many communities that practise CFM have applied for this communal land title so that their rights to use the land will be preserved.

These four government policies are highly controversial in terms of the dilemma of balancing human rights and forest conservation. Although the objective of these policies is to preserve the forest while helping highlanders, their implementation could lead to increased forest exploitation or to unsustainable development. Hence, the performance and results of these policies are very important to reaching the goals of increasing forest conservation and preserving the subsistence livelihood of highlanders who rely on the forest. Therefore, this study will focus on selected case studies about legal consciousness and will be concerned with

¹¹⁹ Cabinet Resolution, *Resolution on Forest Trespassing in Nakhornratchasima Province* (22 April 1997), online: http://www.cabinet.thaigov.go.th/cc_main21.htm; *Cabinet Resolution: Solution on Land Conflict in Forest Areas* (30 June 1998), online: Government of Thailand <http://www.cabinet.thaigov.go.th/cc_main21.htm>.

¹²⁰ Cabinet Resolution, *Restoration of Karen Culture* (3 October 2010), online: Government of Thailand <<http://www.eppo.go.th/admin/cab/cab-2553-08-03.html>>.

¹²¹ *Ministerial Regulation on Communal Land Title*, Royal Thai Government Gazette 127:73 (11 June 2010).

the implementation of laws and policies that can keep balance between human needs and nature conservation.

As illustrated in the description of the forests and people in the north of Thailand, many problems have occurred. Deforestation, degradation of hill tribes' livelihoods and over-exploitation of the forest are the main concerns of this study. CFM is proposed as a way to resolve these problems. However, implementation of CFM still faces challenges in the legal system. This is despite the fact that forestry scientists and environmentalists as well as anthropologists and human rights activists – and society at large – are all in agreement that CFM could be one of the solutions.¹²² However, in the legal realm, groups advocating for CFM have rarely taken their cases to the Thai courts even though the law has already provided a way of protecting CFM rights under the *Constitution*. In fact, the underuse of the *Constitution* as a way of enforcing CFM rights is another issue that I want to study by looking at Thai legal culture.

1.3 Objectives of This Study

This study has two main objectives. The first objective is to understand Thai legal culture as it affects CFM implementation. My research seeks to understand the practice of CFM by local and indigenous people in northern Thailand. It also aims to investigate the implementation of their community rights, which have previously been ignored in the Thai legal arena.

The second objective is to apply socio-legal theory as research methodology, as I realize that the “law in books” and the “law in action” provide different answers to people who seek justice. My view is that the use of an “alternative” critical legal method that looks at the social contexts of state law and CFM would shed more light on the struggle of CFM practitioners in Thai legal culture than a study based simply on analyzing the black letter law.

¹²² This argument is still controversial and it is debated in Thai society whether exclusion of human activities from the forest would help the forest to recover on its own. However, over the past decades, the idea of human exclusion has not been seen as a realistic objective due to lack of funding and manpower. As people who rely on the forest need to protect it for their own benefit, it would actually be more effective if these people were to become better forest stewards. However, in conducting CFM, it is important to determine whether communities are really practising forest conservation sustainably. Concerns about who will monitor CFM and how it should be monitored are important, but are beyond the scope of this study.

The main question this research asks is whether, in practice, Thai legal culture is compatible with the exercise and protection of community rights, which are formally considered constitutional rights. If we can understand community rights practices with regard to community forests and the causes of the struggle for implementation of these rights, this understanding should lead to better protection and enforcement of these rights under the Thai *Constitution*. Hopefully, this will lead to more self-sufficient communities and preservation of the forests through designation of PAs and sustainable development.

1.4 Methodology

For this study, I started by interviewing people who are directly involved in CFM. My interviewees are divided into three categories: villagers, government officers, and members of the legal profession. My interviews illustrate the legal consciousness of these various groups, how they apply the law concerning CFM and how they think about the law. The next step was to determine the legal cultures in the Thai legal system. To do this, I investigated Thai history and social contexts to see how law was mobilized. To illustrate Thai legal culture from within, I also looked at a variety of legal institutions and texts, namely: the law-making process; legal education; commentaries and textbooks; and court decisions.

For my interviews, I chose communities that practise their CFM in Protected Areas such as national parks and wildlife sanctuaries. This is because one of the debates about CFM is whether it should be allowed to be practised in PAs; therefore, I wanted to study such communities to see how they would manage this controversial issue. I chose not to focus on CFM outside PAs because the RFD, via the Community Forest Management Bureau, has already granted CFM certificates to communities that have applied for five-year projects,¹²³ so these communities will have fewer legal issues concerning law implementation. However, CFM in forest reserves still needs to be concerned with monitoring ecosystems and biology and to be cautious about expanding forest use. Thus, if the legal issues concerning CFM in PAs can be resolved, the same principles can be applied to CFM outside PAs.

Another factor I considered is that my subject communities should have a certain level of acceptance from the public about the reliability of their CFM and their responsibility towards the environment. Not all forest dwellers can be forest protectors. Moreover, not every

¹²³ I will discuss this in more detail in section 3.3.2 and section 5.1.4.

community that practises CFM does so sustainably. Many communities have claimed to practise CFM, but in fact they could not maintain and preserve the forest. A fundamental principle of CFM is participation in natural resource conservation; thus, the people who participate in CFM should have the objective of conserving the forest. Because my area of study is law and I cannot prove whether communities are successful at reviving ecosystems and biodiversity in their CFM areas, and because my objective is not to propose criteria for successful CFM, I have chosen to study “well-known” communities whose CFM practice has generally been well-accepted by the public.¹²⁴ Public acceptance was therefore an important consideration in selecting my subject communities. While acceptance from NGOs, the RFD or the DNWP may not prove that a community can sustain biodiversity, as such acceptance tends to focus on the communities’ ongoing performance of their CFM rather than on scientific results, the need to establish an appropriate mechanism to monitor forest ecosystems managed via CFM is still a serious issue.

According to the two criteria described above – being located in PAs having publicly accepted CFM – I selected three communities for my case studies. Each community has its own characteristics that stand out: 1) Tambon Maetha initiated the *Community Forest Bill* movement and was also a role model for other CFM communities in terms of how to interact with state law; 2) Ban Huaieikhang was the site of the first provincial case on community rights, in which the community chose its own methods of dealing with state authorities; and 3) Ban Khunte is notable for adapting to government projects and maintaining their CFM using technology such as GPS maps.

The first community, Tambon Maetha, is made up of a mix of lowland people and hill tribe groups, while the other two communities are made up of people from the Karen ethnic group. None of these communities are typical communities that practise CFM. Thus, their legal consciousness, as illustrated in this study, cannot be generalized to other communities, as I believe each community has its own unique experiences and attitudes toward the law and reactions to CFM implementation.

¹²⁴ As preserving the ecosystem and biodiversity is crucial to forest conservation, I would hope that the people who practise CFM will take this into account. My contribution will be to study the relevant legal issues to find ways to better implement CFM in the Thai legal system.

“Well known” means well-known to people who are involved in CFM. I did a preliminary survey in 2009, observing NGOs who worked on CFM advocacy as well as government officers, and also conducted documentary research before selecting these three communities.

When I conducted interviews in the selected communities, I decided to interview five categories of persons: formal political leaders, members of CFM committees, spiritual leaders, women involved in CFM, and youth representatives. Three generations of people are also represented among the interviewees: youth in their teens and 20s; working people, including formal political leaders, who are, on average, 30 to 50 years old; and elders, including spiritual leaders, who are more than 60 years old. I was introduced to interviewees by the headman of each community, who then introduced me to other potential interviewees. Because this approach was used, this research reflects the “best case scenario”, as I chose well-known communities and active citizens as interviewees. Therefore, this research may be limited by the fact that it may not represent the “dark side” of CFM implementation (e.g. oppression from leaders or members of CFM committees and disagreement about CFM regulations). However, my main focus is on how the villagers have created their legal consciousness and formed their CFM practices in such a way as to make themselves, as well as other people such as NGOs and government officers, believe that they are good examples that can inspire other CFM communities. This was the main reason that I decided to choose these relatively active target groups.

The next group was made up of government officers whom I chose from among those who work near the three selected communities and who were willing to give interviews. There are three groups of officers that have direct authority over CFM: RFD and DNWP officers who work near the selected communities; officers from Community Forest Management Bureau; and officers from Academic Unit in the Regional Office of Conservation Areas. The interviews with this group show their legal consciousness regarding forestry law enforcement and CFM implementation through their duties and their beliefs.

The last group consisted of members of the Thai legal profession – judges, public prosecutors, and lawyers. These legal professionals were interviewed in order to reveal the reasons and strategies behind the legal enforcement and implementation of CFM and constitutional rights. This group was randomly selected in Chiang Mai Province; judges from the Supreme Court were randomly selected in Bangkok.

The identities of all interviewees have been kept confidential, allowing them to express their views freely.

In addition to conducting field research interviews, I also reviewed documentary sources – court decisions, legal commentaries, legal textbooks, and historical sources – in order to

illustrate legal change in Thai society in holistic contexts. This documentary analysis will reflect the legal culture that is embedded in the Thai legal system, and that supports the legal ideology behind the legal profession's response to CFM.

1.5 Structure of This Dissertation: Roadmap

In dealing with problems of forest degradation and of poverty, forest stewardship by people who rely on the forest – in other words, the commons – suggests the importance of people's participation in forest conservation in Thailand in terms of CFM. However, people's practice of CFM seems to conflict with the rules and practices of the government organizations that have direct authority over forest areas. Although the current *Constitution* protects the rights of traditional communities to maintain their traditions and participate in natural resource conservation, somehow the implementation of these protections is lacking. Thus, my hypothesis in this dissertation is that the Thai legal system is not compatible with CFM. To find the answer, my main objectives have been to search for the legal consciousness of the people who are involved in CFM implementation and for the legal culture in the Thai legal system.

In carrying out my research, I used two kinds of research tools: interviews and documentary research. I conducted field research interviews with people from three groups involved in CFM: villagers who live in communities that practice CFM; government officers who have direct authority under the forestry laws in forest areas; and members of the legal profession. In addition to interviews, I carried out documentary research on the legal, political and historical contexts of the Thai legal system, looking at such documents as legal commentaries and court decisions.

The following is an overview of what is discussed in this dissertation. In Chapter 2, I explain the legal theories that support this study, including the socio-legal approach to legal consciousness and legal culture that is my basic method. In Chapter 3, I illustrate the background to CFM and the Thai legal system. Chapter 4 is based on interviews with three selected communities that practise CFM. Chapter 5 is also based on interviews with government officers and members of the legal profession who are involved in the implementation of CFM. In the interview-based chapters, I aim to demonstrate legal consciousness regarding CFM. Chapter 4 presents villagers' attitudes about the law and CFM implementation, while Chapter 5 illustrates the legal consciousness of government officials and

members of the legal profession in their reaction to the villagers' CFM. Chapter 6 describes and critiques the elements of Thai legal culture that make it incompatible with CFM. I discuss two dimensions of incompatibility: 1) the history and social contexts that formed the Thai legal system as well as the legal culture; and 2) institutional components, namely legal education, commentary and textbooks, and court decisions. Finally, in Chapter 7, I conclude my findings on Thai legal culture and its impact on CFM implementation, and note that my study has answered some questions, while leaving other questions unanswered.

In the next chapter, I will illustrate the four legal concepts that have helped me conduct this study. In the first two sections, I describe my research approach and methodology. In the third section, I present a group of legal ideologies that I use for my analysis of the law concerning CFM and its implementation. Finally, in the last section, I discuss the group of legal concepts that explains the findings of my research.

CHAPTER 2 APPLICATION OF LEGAL CONCEPTS

There are four main legal concepts¹ that are used in this study. The first concept is legal consciousness and the second concept is legal culture. These two concepts are used as research methods to find out what people think and how they apply the law concerning CFM. The third concept I use is green legal theory, which critiques objects of study, such as forest management, conservation and people's participation, from an environmental legal perspective. This study uses green legal theory to critique Thai legal culture, especially its implementation of state forestry law and CFM. Hence, I have chosen to apply five approaches that green legal theory uses when it criticizes legal systems— new naturalism, state power, the commons, legal pluralism and indigenous legal studies – which can demonstrate interrelationships between people, government officers, and legal professionals, and can appraise their performance regarding CFM. I use the fourth concept, the living law concept, to explain phenomena found in this study. These four legal concepts are both the tools and the content that I use to facilitate my analysis of CFM implementation in Thai legal culture.

2.1 Legal Consciousness

This study uses the concept of legal consciousness to reveal people's perspectives on the implementation of law concerning CFM. Because legal consciousness illustrates what people think about law and how they interact with law in real life, it is a useful research tool to discover what informs people's ideas about law enforcement, namely: religious beliefs, adaptive behaviours, and mobilization of the legal system that shapes CFM in Thailand. Legal consciousness unfolds reasons for people's behaviour, including that of villagers who practise CFM, government officers who enforce the state forestry laws, and of legal professionals who conduct cases concerning CFM.

Legal consciousness is one of the forms of empirical study that goes beyond "materialization" of the law.² Once the law is written down, it becomes static, and becomes

¹ I use the term "legal theory" loosely because the "theory" that I mention in this section could also be called "concept", "idea", or "approach".

² I found the word "materialization" interesting in that it shows a distinguishing between the written law and the law in action, or living law, in North America. This word was also used in the Russian legal context

alienated from living law, because law in society is usually dynamic. Although society constitutes the law and its legal doctrines in bodies of texts, what is more important is how the law is enforced. Accordingly, the study of legal consciousness presents the law as being alive and shows the influence of law in real life by focusing on how individuals see themselves as being embedded in the law and as being entitled to its protection. When people take a problem to the legal system, they act in response to their legal consciousness; this consciousness may be positive, or negative, or may even drive them away from the law. I will apply the legal consciousness concept in Chapters 4 and 5 when I analyze my field research interviews with villagers, government officers, and legal professionals about their attitudes toward laws concerning CFM, such as the *Constitution*, forestry law, and community CFM regulations.

The meanings of legal consciousness are various and its scope is broad. Legal consciousness is classified as a sub-branch of legal culture studies. Legal consciousness focuses on individual attitudes toward the law at the micro level, investigating what people think, say, and do about the law, while legal culture focuses at the macro level on the behaviour of the legal system.³ However, legal consciousness is not focused on individual perspectives and actions alone, but looks at people's attitudes and how they form social structures and reflect social practices.⁴ After observing and collecting information on legal consciousness, researchers want to find out about people's thoughts and beliefs about, reactions to and experiences of the law. According to legal consciousness researchers, people's perceptions of law have to be considered in the context of legal systems, because legal consciousness depends on other circumstances such as collective action in society.⁵

As this study will reveal, the villagers I interviewed live in and rely on the forest and have traditions and laws relating to its spiritual nature and therefore to forest conservation. Meanwhile, the impact of globalization has forced villagers to expand their consideration of

to describe, for example, legislation incorporating social norms or legal principles from folk law or common law. See Silvia Kaugia, "Structure of Legal Consciousness" (1996) 1 *Juridica International* 16, online: *Juridica International* <<http://www.juridicainternational.eu/index/1996/vol-i/structure-of-legal-consciousness/?highlight=Kaugia,,Silvia#top>>.

³ Susan Silbey, "Legal Culture and Legal Consciousness" in *International Encyclopedia of Social and Behavioral Sciences* (New York: Elsevier, 2001) 8623, online: IEBS <www.iesbs.com> at 8626.

⁴ Susan Silbey, "Legal Consciousness" *New Oxford Companion to Law* (Oxford: Oxford University Press, 2008), online: Massachusetts Institute of Technology <http://web.mit.edu/~ssilbey/www/pdf/Legal_consciousness.pdf>.

⁵ *Ibid.*

forest conservation, and they have reacted to this pressure in their own ways by still living in the forest and retaining their beliefs but creating new CFM regulations and practices.

The study of legal consciousness has two branches. First, studies about legal consciousness sometimes focus on public attitudes toward the law, such as people's perceptions of fairness, or citizens' commitment to and alienation from law and legal values.⁶ Second, after finding public attitudes towards law and its implementation, studies of legal consciousness also look at people's perceptions of law as an epiphenomenon of social structure.⁷ The legal consciousness of villagers from selected communities, and of government officers and legal professionals will thus be analyzed as epiphenomena of social structures such as forestry laws and government policies on highlanders and forest areas. The legal consciousness of these interviewees is a result of everything that has happened to them and has shaped their consciousness; their legal consciousness then causes them to create their own understandings of CFM.

The second concept of legal consciousness focuses on constructions and exercises of the law that often nurture class interests and inequities. This second type of legal consciousness reflects structuralist and Marxist theories; an example of this is research on working class people's perceptions of their true interests.⁸ This example also illustrates that researchers have to be cautious about "false consciousness", which is what happens when subjects do not realize their true interests in the legal structure.⁹ This is a challenge for the study of legal consciousness of which I will be mindful when I analyze people's perceptions in my interviews.

For instance, I found during my research with the villagers that they were dealing with false consciousness in connection with the next step of their movement, or their legal mobilization, after their struggles with Thai legal culture. To date, the *Constitution* has not been directly applied to protect their community rights and more time is required before the legal culture can be changed. Lately, the villagers have moved toward communal land title, which was a government policy adopted following the landless farmers' movement. The Indigenous Peoples' Assembly joined this movement as they believed it would help secure their

⁶ Silbey, *supra* note 3 at 8626.

⁷ *Ibid.*

⁸ *Ibid.* at 8627.

⁹ *Ibid.*

land rights in forest areas. Indeed, the forest people¹⁰ wanted to secure their rights to live and maintain their livelihoods according to their traditional methods, only adding greater concern for forest and ecosystem conservation to their practices. However, this objective required more attention to cooperation with government agencies such as the RFD and DNWP. If the government agencies and the forest people do not deal with this issue, the movement of the forest people might lead in the opposite direction from forest conservation. This would imply false consciousness.

Legal consciousness research has developed from its beginnings in the 1980s and, in its current stage, it exhibits three characteristics.¹¹ First, researchers have begun to research ordinary people in society rather than to research only the law or legal professionals. Second, research methods are broader than in the past, when they were attached to measurable behaviour only. Also, while law used to be only a tool in society, it is now seen as fulfilling various roles such as communication, construction, and interpretation of social relations.¹² The last and most important development of the legal consciousness concept is that it uses more conceptual units of analysis. While, in the past, legal scholars only studied cultural meanings of social actions and formal institutions, including state law, legal consciousness researchers now look at the law as hegemonic rules and phenomena created by humans. The study of law now delves deeper into the complexity of social relations, looking for examples in local cultures and indigenous texts to try to comprehend the real function of law in society.¹³ This focus on the complexity of social relations will help me to investigate local cultures and religious beliefs to see people's action on legal implementation (e.g. of CFM regulations), and to read historical legal texts in their social, political and economic contexts to see the dynamics of legal mobilization.

Socio-legal studies has shifted its focus from law and society to law *in* society, and now pays more attention to the effects of law in society rather than to the effectiveness of legal institutions. This wider research scope supports developing legal institutions that respond to social needs. According to socio-legal studies, the law mobilizes people to solve conflict

¹⁰ "Forest people" in this study means people who live in and rely on the forest and claim that they will perform their role as forest stewards. See online: Forest Peoples Programme <<http://www.forestpeoples.org/>>.

¹¹ Susan S. Silbey, "After Legal Consciousness" (2005) 1 Annual Review of Law & Social Science 323 at 326.

¹² *Ibid.* at 327.

¹³ *Ibid.* at 328.

without always resorting to litigation, because everyone understands the rules in their societies and there is no need to pursue disputes to this level. Thus, trials are exceptional incidents.¹⁴ In this study, I use the exceptional examples of litigation of CFM cases, such as the *Pati Ming* case,¹⁵ to illustrate the legal consciousness of lawyers that reflects their attitudes toward the villagers' CFM regulations.

The new socio-legal concepts provide a broader view of the function of law in society than did legal studies in the past; socio-legal theory also reminds us that researchers should take into account the legal consciousness of ordinary people, as it is the invisible power driving society. Researchers in this area apply various research tools such as surveys of law enforcement in society, ethnography, and historical studies. I use interviews with villagers to show ordinary people's legal consciousness and their legal mobilization concerning the CFM bill.

Based on the European concept of legal consciousness, including the work of Eugen Ehrlich, people's opinions about *Rechtsstaat*¹⁶ – "people's own idea of law and right" – encompasses a broader meaning than the North American concept of legal consciousness that focuses on people's attitudes about "official" law.¹⁷ In this study, I will use "law" to include the villagers' CFM regulations that have not necessarily been recognized by the Thai state as official law, but can be accepted to some extent under the concept of legal pluralism,. In any case, the villagers' regulations are compatible with the concept of living law because they have real functions in local communities.

Ehrlich's concept of living law seems suitable for this study on CFM in Thailand because the laws that are involved in CFM implementation are various, including state laws such as the *Constitution* and forestry statutes, administrative orders and villagers' CFM regulations. According to Ehrlich, professional institutions, i.e. courts and legislatures, use the law as a norm when making decisions, while ordinary people believe in the rule of law and that it obliges them to behave appropriately in society.¹⁸ Thus, Ehrlich's living law approach focuses on both

¹⁴ *Ibid.* at 331-332.

¹⁵ I will discuss this case in detail in section 4.2.6.

¹⁶ *Rechtsstaat* is a German word that means "state under the rule of law".

¹⁷ Marc Hertogh, "A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich" (2004) 31:4 *Journal of Law & Society* 457 at 459.

¹⁸ *Ibid.* at 473.

ordinary people's behaviour and the internal functioning of legal institutions.¹⁹ This concept will be applied when looking at how the villagers use their CFM regulations. Ordinarily, community members apply their own laws as norms, but make use of state law in cases in which situations cannot be dealt with using the local regulations. Thus, the internal functioning of government agencies such as the police, RFD and DNWP are important to consider when trying to understand people's approaches to their CFM regulations.

One of the features that makes Ehrlich's concept of living law different is that he uses the term "norm", which is broader than the term "official law" used in connection with Roscoe Pound's concept of "law in action".²⁰ To search for the legal consciousness of ordinary people, Ehrlich described law as a concept (*Gedankengebilde*) that exists (or not) based on people's attitudes.²¹ Although the distinction between definitions of law and social norms in this approach is not clear,²² the objective of the research is to find out what ordinary people think about the law in their own terms. Even if what people view as law is not considered law in positivistic legal terms, it at least has force and power in real life. This approach based on lay people's interpretation of law creates new visions of legality that mobilize the legal system.²³ In the selected case studies, villagers use the *Constitution* as their tool to enforce their rights to practise CFM and they also draft their own CFM regulations and enforce them among themselves as the "real" living law, even though CFM regulations might not be seen as law by Thai legal professionals.

As a research tool, legal consciousness has been used to investigate individual agency in social structures, and to illustrate causation and determination between subjects and social constructions. For example, Patricia Ewick and Susan Silbey, in researching how people in New Jersey use courts, collected stories of everyday experiences by "having conversations" and analyzed their data from the perspectives of different disciplines, such as sociology, cultural

¹⁹ *Ibid.* at 474.

²⁰ *Ibid.*

²¹ *Ibid.*

²² This study applies a broad definition of "law" based on Eugen Ehrlich's concept of living law. Here "law" means a rule that people accept and enforce, which contains sanctions for when someone violates the rule. However, in the Thai legal system, "law" means a rule that the sovereign enacts and which contains sanctions based on positivist traditions. I will describe the Thai legal system below in Chapter 6, section 6.1.3.

²³ Anna-Maria Marshall & Scott Barclay, "In Their Own Words: How Ordinary People Construct the Legal World" (2003) 28 *Law & Social Inquiry* 617 at 618.

studies, and legal theory.²⁴ According to Ewick and Silbey, people look at the law and legality from three different standpoints: 1) “before the law” – when people treat the law as magisterial, alien and remote; 2) “with the law” – when people involve themselves in the law as players negotiating the game of law; and 3) “against the law” – when people think about the law as an arbitrary and unreliable force. This study shows that people as individual agents interact with the law and the courts based on their perceptions of the legal system. These three classifications will help to clarify how villagers and government officers perceive the law concerning CFM. This will be discussed at length in Chapters 4 and 5, as part of the analysis of my field research interviews. As I will illustrate in Chapter 6, social structures concerning land rights and natural resource management helped to create people’s reactions to the law concerning CFM.

Legal consciousness of the people works as a precondition of legal mobilization, as David Engel and Jaruwat Engel have shown in their study of the legal consciousness of people in northern Thailand and how they react to personal injuries.²⁵ The Engels selected case studies and interviewed victims of accidents. Although the interviewees knew that they could use the law to claim compensation for their injuries, they chose not to do so. Some believed that karma and spirit caused their accidents and thus they did not want to pursue any legal remedies, and just hoped their bad luck would run out.

Others did not believe in the usefulness of the legal system and thus did not want to bother going to the police and to the court. The Engels described relevant social developments, such as the fact that the actual number of accidents had increased, while at the same time the number of injury cases in Chiang Mai Provincial Court had gone down. They also outlined the legal context, describing available legal services, insurance laws and mediation systems as alternative methods of dispute resolution, in order to try to explain why the number of personal injury cases had declined. Providing the social and legal contexts gave readers a broader understanding of people’s awareness of the law and litigation, which was influenced by their religious beliefs. As a form of legal mobilization, legal consciousness illustrates public opinion that points out legal problems in society such as malfunctions of the law or lack of

²⁴ Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998).

²⁵ David Engel & Jaruwat Engel, *Tort, Custom, and Karma: Globalization and Legal Consciousness in Thailand* (Stanford: Stanford University Press, 2010).

access to justice. Consequences of legal mobilization may include creating political movements supporting particular interests that have a “pushing” effect on social structure.²⁶

The Engels’ findings are applicable to my study, as some village CFM regulations are enforced by using concepts of bad karma and forest spirits to either scare exploiters away from the forest or to encourage people to behave respectfully towards the forest. Modern understandings of ecosystems and biodiversity simply provide new knowledge supporting the same concept of respect for the forest and environmental balance. Further, from the Engels’ illustration of legal consciousness of Thai people, when people do not believe that the law can provide justice, this may be a step to legal mobilization to demand justice in society. This demand for justice can be used to explain the people’s movement to propose the *Community Forest Bill* after they realized that the state forestry law would not allow them to participate in forest conservation or use forest areas. People also mobilized for greater implementation of the *Constitution* in the Thai legal system out of their legal consciousness about their “people’s constitution.”

Another example of research focused on legal consciousness is the work of Frank Munger in Thailand.²⁷ Munger interviewed three generations of lawyers who had devoted themselves to social movements such as the movement for civil rights and the environmental movement. Munger presents the individual experiences of selected lawyers and their perspectives on legal problems in Thai society. He also probes the social contexts of legal education, as well as social problems, to explain the selected lawyers’ reactions to the law. Munger’s approach merges individual experiences and their legal implementation with the history and social contexts in each case, so that his work reveals the dynamics of legal consciousness across generations of lawyers fighting for social change.

Munger’s concept of legal education shaping how lawyers think and practise the law will be applied in Chapter 6 in the context of the legal institutions that will help lawyers to have more understanding of CFM. However, currently, this situation still affects only a small group of lawyers rather than the mainstream of legal professionals. Munger’s focus on the significance of lawyers’ personal experiences provides insight into judges’ perspectives on

²⁶ Marshall & Barclay, *supra* note 23 at 620.

²⁷ Frank Munger, “Globalization, Investing in Law, and the Careers of Lawyers for Social Causes: Taking on Rights in Thailand” (2010) 13:1 Thailand Law Journal, online: Thai Law Forum <<http://www.thailawforum.com/articles/globalization-human-rights-lawyers.html>>.

forestry and CFM cases resulting from their knowledge of deforestation and experiences with untrustworthy people in forestry cases.

Another example of the study of legal consciousness is an article by Erik D. Fritsvold, in which he uses in-depth interviews with 17 selected “radical” environmentalists.²⁸ Fritsvold applies the principles outlined in Ewick and Silbey’s 1998 study to illustrate legal consciousness among these participants in the environmental movement. He also suggests a new standpoint of legal consciousness, “under the law”, which reflects the belief that society can be protected through the use of unlawful acts. This study focuses on tactics of civil disobedience and “lawbreaking” actions as tools to draw public attention – so-called “direct action” – so that environmental issues can be put on the political agenda. Fritsvold explains the legal consciousness of the radical environmentalists as looking at law as an illegitimate tool of the social order and as a way of repressing dissent. “Under the law” is different from “against the law” in that it still believes in the law as magisterial, although it holds that law fails to provide justice and thus promotes modest resistance to the law.²⁹ The standpoint that the radical environmentalists represent is revolutionary and uses direct action as a symbolic way of exterminating the “evil” law. I will refer to this concept of “under the law” in my analysis in Chapters 4 and 5 when I classify people’s attitudes toward the law.

The last example of legal consciousness scholarship is Arun Agrawal’s article entitled “Environmentality”.³⁰ Agrawal’s research shows how people in a village in India became environmentalists after their forest lands were over-exploited. This study uses in-depth interviews with villagers and forest council members, as well as documentary research on forest council regulations and archival materials about the villagers’ “environmental performance” in stewarding the forest. Agrawal found that the villagers converted their beliefs and actions into creating a forest conservation community after struggling with deforestation, and that the main cause of the change in their behaviour was their dependency on the forest for their household consumption (e.g. for firewood and construction materials). However, this shift to environmental activism did not happen to everyone in the community. There were some extremely poor people in the village who could not afford this change because they did not

²⁸ Erik D. Fritsvold, “Under the Law: Legal Consciousness and Radical Environmental Activism” (2009) 34:4 *Law & Social Inquiry* 799.

²⁹ *Ibid.* at 806-807.

³⁰ Arun Agrawal, “Environmentality: Community, Intimate Government, and the Making of Environmental Subjects in Kumaon, India” (2005) 46:2 *Current Anthropology* 161.

have money to support the forest guardians and still needed to use forest products for domestic consumption. Agrawal's study reveals both individual perspectives and actions in response to a forest conservation crisis, and the social, historical, political, economic and legal contexts surrounding the community's transformation and embracing of forest stewardship.

Agrawal searches for historical legal background and investigates the social contexts that form the law leading to the embracing of forest stewardship in the villages. I follow this model in my research. My village interviewees and Agrawal's study subjects share the same pattern of history, realizing the importance of forest conservation once they faced degradation of the forest – and meeting the challenge to revitalize and protect the forest. The needs of the ecosystem taught them a lesson. Both Agrawal's research and mine suggest that most of the communities that rely on the forest have had similar experiences of deforestation and have received similar assistance from governments and NGOs, but only some communities were able to maintain their CFM. This leads me to question what shaped these communities' legal consciousness regarding forest conservation. At the same time, I want to know about what inspired the government officers to cooperate with these communities.

The examples above show how the legal consciousness approach is used to conduct socio-legal research. These examples have guided me in forming my research approach. Legal consciousness is a theoretical concept that helps us find out what the law does, instead of what the law is, and it also helps us to answer questions about when, why, and by whom the law is used, or not used.³¹ Three assumptions can be made about the effects of the legal consciousness of ordinary people on legal implementation.³² First, people's beliefs, values and behaviours have direct effects on legal implementation. For example, people's reactions when they have motorcycle accidents determine whether they will call the police or insurance company or will ever bring their cases to court. Second, state law has the power to manipulate how people react to the law. The power of law can either be positive – for instance, it can guarantee rights and empower people in their activities – or it can be negative, imposing limitations on people's freedoms. Third, although law may be acknowledged by people, people choose whether to enforce the law. For example, because of traffic lights, drivers know when they have to stop and when they can go. However, if they choose to run a red light, or to just try to race against a red light, then they will have to face the consequences. Drivers can choose

³¹ Silbey, *supra* note 11 at 326.

³² Marshall & Barclay, *supra* note 23 at 622.

how to conduct themselves, but their choices will affect the implementation of the law.³³ In Chapters 4 and 5, I will use this concept – about when, why, and by whom the law is used or not used – to reveal the legal consciousness of the people who are involved in CFM.

The study of legal consciousness helps legal implementation, both from the perspective of lawyers and judges, as it helps them in their decision-making processes, and from the perspective of ordinary people, who hope that the legal system will continue to support their basic human needs, such as the need to protect the environment, ecosystems and livelihoods. As mentioned at the beginning of this section, legal consciousness is interested in the micro perspective, in looking at ordinary people's everyday lives and how they reflect and embody the law and legal culture. While basing the study of legal consciousness on people's stories seems simple, it becomes more complicated when individual stories are placed in the context of social structures. The next section will explore legal culture theory, which portrays a macro view of the behaviour of professionals in the legal system.

2.2 Legal Culture

The second important research task in this study is to understand Thai legal culture and how it obstructs CFM implementation in the legal system. First, however, I have to search out Thai legal culture. The legal culture approach can help to explain legal actions and their impacts on society. At the earlier stages of its development, legal culture studies focused on perspectives of members of legal institutions, such as lawyers, public prosecutors, and judges. Later, the concept of legal culture expanded to encompass interest in public and individual attitudes toward the law, which is currently referred to as "legal consciousness".³⁴ In this study, I differentiate legal consciousness from legal culture by using the legal consciousness of ordinary individuals to reflect on the micro perspective of their lives and their implementation of law, to show how they use the law to practise CFM. In the early days of the study of the sociology of law, Lawrence Friedman referred to this micro perspective as "external legal culture"; however, legal scholars currently tend to call it "legal consciousness".³⁵ From the macro perspective, I have used historical and social contexts to provide a holistic picture of the

³³ *Ibid.* at 623.

³⁴ Silbey, *supra* a note 3 at 8625.

³⁵ *Ibid.*

Thai legal system. I have chosen to discuss legal consciousness before legal culture because in my field research interviews I looked for people's legal consciousness at the micro level before looking at the bigger picture of legal culture at the macro level. I have chosen this structure although I acknowledge that legal consciousness is a more recent sub-set of legal cultural studies.

The definition of legal culture relies on the meaning of culture, although this is still being debated by anthropologists. In general, people who study legal culture look at practices of selected actors in the legal system. In the early era of the study of the sociology of law in the 1970s, Friedman discussed basic ideas about law and society.³⁶ First, he explained the legal system so that the study of legal culture could focus on the structures, substance, and cultures that legal systems have in common.³⁷ He defined legal culture as attitudes, values, and opinions held in society toward the law and legal system. Legal culture will inform people's decisions about when and where to use the law, legal institutions, and legal processes.³⁸ The attitudes and ideologies of legal professionals also help to create legal phenomena in society.³⁹ Friedman's explanation of legal systems and legal culture will help me to define Thai legal culture and investigate how Thai legal ideology causes conflicts between CFM application under state forestry law, the *Constitution* and villagers' regulations.

Friedman categorized the study of legal culture that first focused on practices and ideologies in legal systems as "internal legal culture".⁴⁰ This internal approach looks at the legal system as it works in everyday life, based on legal doctrines, internal rules and practices. Also, this approach considers general categorizations in society based on ideas such as race and gender. The internal approach measures legal culture by looking at legal practices, ideologies, and structural factors. For example, it looks at the role of lawyers inside legal institutions and as part of the legal profession, as well as how lawyers' roles shape how the law works. Friedman further related legal culture to the idea of a family of legal systems by using comparative legal study to categorize legal systems and the core common features of legal "families" (e.g. civil

³⁶ Lawrence M. Friedman, *Law and Society: An Introduction* (Englewood Cliffs, NJ: Prentice-Hall, 1977).

³⁷ *Ibid.* at 75-76.

³⁸ *Ibid.*

³⁹ Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975) at 193.

⁴⁰ *Ibid.* at 194.

law and common law).⁴¹ Hence, classification of legal systems helps to shape primary legal culture before it is further shaped by specific behaviours of legal professionals in each society.

The Thai legal system is from the civil law family, and in Chapter 6 I will illustrate how the civil law has shaped Thai legal culture. Decoding Thai legal culture also involves researching internal legal culture by looking at legal institutions such as law schools and texts as a reflection of the legal ideology and thought of legal professionals – lawyers, public prosecutors, and judges. I will also investigate court decisions and law making processes to see how Thai law is implemented.

According to the idea of the family of legal systems proposed by comparative legal scholars,⁴² traditions in each legal family demonstrate different characteristics. Each legal family has been formulated in its tradition over a long period of time. One way to investigate legal tradition is to understand the history of a given society because this is what constructs the current legal tradition.⁴³ Many legal traditions based on oral tradition have a limitation in this sense because the legal past is retained only in memory.⁴⁴ The legal family which is central to the Thai legal tradition is civil law, and its other “relatives” are Hindu and Asian religious and legal traditions.⁴⁵

Hinduism, Buddhism, and indigenous legal philosophies are still embedded in Thai culture and affect people’s legal consciousness. I notice that ordinary people apply the living law when they are the subjects of action. While legal professionals are also influenced by traditional beliefs such as karma, when they enforce the law, the influence of the civil law

⁴¹ *Ibid.* at 201.

⁴² René David, in his work on comparative law, classified major legal systems into five groups or families: Western laws, which have subdivided into Romano-Germanic or civil law systems and Anglo-Saxon or common law systems; Soviet law; Muslim law; Hindu law; and Chinese law. Later, Zweigert and Kötz revised this classification and divided legal systems into six families: Roman, Germanic, Common Law, Nordic, Far Eastern (China and Japan), and Religious (Muslim and Hindu law). My study uses David’s classification, as the Thai legal system is classified as a civil law system according to the Thai legal and educational literature. While my analysis of legal culture will also mention Hindu law as having influenced ancient Thai law, this does not mean that the Thai legal system should be classified as belonging to the “religious” family. See René David, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (London: Stevens, 1985); K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, trans. by Tony Weir, 3d ed. (Oxford: Oxford University Press, 1998).

⁴³ H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000) at 4-6.

⁴⁴ *Ibid.* at 9-10.

⁴⁵ I intentionally use the phrase “legal tradition” to distinguish it from “legal culture”. “Legal tradition” in this study means a pattern of action and behaviour that a legal family expresses and that becomes a core feature of that legal family. In contrast, legal culture is more complex in that it is more flexible.

tradition seems dominate their own beliefs, as they are personal and separate from their legal duties.

The civil law tradition originated in ancient Rome and consists of constructing national law codes, while denying the power of judges to make law. In the civil law tradition, law is an instrument of reason and humanism. Often, civil law tradition applies concepts of positive law that shape legal systems, although sometimes it creates revolution in society and thus creates new normative concepts of law. Civil law dominated by positivism uses written law and interprets according to written laws as a fundamental principle.⁴⁶ The adopted civil law tradition dominates Thai legal culture nowadays – and influences modern Thai society.

Hindu legal tradition is based on *Brahmans* and *dharmasastras*, the *Law of Manu*.⁴⁷ One of the main characteristics of Hindu legal tradition is the focus on karma and dharma.⁴⁸ Therefore, the implementation of law goes beyond legal texts and directs how people should live life. Hindu ideology explains the role of the king in society, who was viewed as a demi-god, and establishes concepts of social and political hierarchy. While its beginnings were in south Asia, Hindu legal tradition came to be influential in many countries in Southeast Asia, including Thailand. These characteristics of Hindu legal tradition are pertinent to my study, as many principles of Hindu law still exist in Thai legal texts; these were inherited from the *Law of the Three Seals* and the *Mangraisart*, both of which were influential in the codification of the major code laws that are still used today. I will explain this further in Chapter 6.

Another family of legal tradition that is relevant to the Thai legal system is Asian religious law, which includes a mix of Confucianist and Buddhist concepts. This religious/legal tradition relies on legal realism, appreciation, and egalitarianism.⁴⁹ This tradition uses realism based on nature and science, and invokes individual responsibility. Time and space are seen as being circular, as are the ecosystem and the life cycle, so that present activities affect the future

⁴⁶ Glenn, *supra* note 43 at 117-141.

⁴⁷ *Brahman* is the supreme, infinite and immanent essence of the universe and “brahmans” refers to the highest caste in the Hindu caste system; brahmans teach the divine book – the sutras. The *dharmasastras* are the laws of Manu, the mythical figure who was said to have given the people this great legal treatise (around 200 BC). The *dharmasastras* became influential in the laws of South and Southeast Asia. *Ibid.* at 253-255.

⁴⁸ “Karma” means the law of cause and effect. For example, when you cut trees, you will lose the trees’ function to provide shade, and their part in the ecosystem. “Dharma” means the ultimate order of the universe, or natural law, which governs everything in the correct and proper manner. Justice is one aspect of dharma. *Ibid.* at 260-266.

⁴⁹ Glenn, *supra* note 43 at 290-295.

environment. Thus, it is one's responsibility to conduct oneself properly; this will lead to a healthy society. However, Asian religious traditions such as Confucianism and indigenous thought conceive of "rights" differently than Western traditions; rather than focusing on claims to rights, they stress people's duties in society that require their action.⁵⁰ However, Asian religious traditions have been declining and are being replaced by more Western concepts of law. In this study, I will show how legal culture was influenced by religious beliefs, and I will also connect the legal consciousness of ordinary people to environmental legal ideology proposed by green legal theory, as I will describe in section 2.3.

There has been an ongoing process of reconciliation between old and new legal traditions.⁵¹ Some traditions exist within other traditions. For instance, Hindu and Buddhist principles have been embedded in the civil law system in Thailand since the country was founded. An example of this can be found in the Thai *Civil and Commercial Code*, which prohibits offspring from suing their parents.⁵² This law is based on the Buddhist belief in the importance of respecting one's parents, and this belief has been written into the law code. Other religious beliefs may not be codified, but people still practise them in society, even though the national civil law system dominates. Additionally, different legal traditions from different sources may share the same concepts. For example, Hindu law on property and possession is similar in many ways to civil law property concepts.

Classification of legal cultures based on a family of legal systems is not sophisticated enough because, in fact, legal systems in modern society have evolved from international interchanges and relationships, and from globalization, all of which tend to mix legal systems together.⁵³ Many legal cultures nowadays are both post-colonial and post-modern, and tend to have roots from several legal families. Since legal cultures adopt core features based on the history and experiences of the societies that form them, these societies must adjust their legal cultures to fit with societal demand. Nevertheless, I think that the classification of legal families is still useful for describing the roots and main functions of legal cultures, and may require the recognition of adaptations of legal culture, perhaps using the concept of legal

⁵⁰ *Ibid.* at 311-312.

⁵¹ *Ibid.* at 319.

⁵² *Civil and Commercial Code*, Royal Thai Government Gazette 196:42 (8 April 1992), s. 1562.

⁵³ Friedman, *supra* note 39 at 203.

pluralism, which could then provide a more comprehensive understanding of legal culture in society.

After the industrial revolution, modernity influenced both the legal system and society. Commerce and modes of production shaped the law to serve the demands of the industrial system. This can be explained using the concept of instrumentality – that law is used as a tool. However, the industrial society explanation does not fit for communities in rural areas, where modes of production are different from those in urban communities, where people mostly work for companies, live individually, and rely on technology and the market. Thus, the law that is instituted by industrialization is not suitable for communities that rely on the forest, or for traditional societies in which people primarily rely on self-sustaining agricultural systems, live communally to some extent and are less reliant on technology and market systems. When formal law that responds to modern society cannot serve the demands of people in traditional communities, they create informal legal systems such as social norms that can serve their needs.⁵⁴ This principle also applies to this study about the Thai legal system, which has adopted “modernized” law that fails to serve traditional community needs, such as the right to access natural resources.

Friedman’s example of difference between modern and traditional communities reflects Thai legal culture in the cities and rural areas. In the cities and outskirts, Thai society is highly commercialized and industrialized, while rural areas still remain agricultural. The more traditional a society is, the farther it usually is from centres of economic development. Less accessibility of communities leads to legal cultures that are less compatible with modern law such as international trade law and intellectual property law.

Urban and rural communities represent spaces and places that shape different legal cultures. Traditional communities rely on the faithfulness and responsibility of their members, while modern communities seem to need more external social controls like legal sanctions.⁵⁵ In the city, people’s life styles fit with modern law and people benefit from law implementation but, in agricultural and traditional communities in remote areas, modern law does not serve people’s needs, such as the need to participate in forest conservation. In the city, people apply the “modern” law while, in rural areas, CFM traditions remain stronger.

⁵⁴ *Ibid.* at 207-208.

⁵⁵ *Ibid.* at 213-216.

One feature of modern law is uniformity.⁵⁶ Because modern society requires predictable regulations that provide security for business, such regulations will be applied to everyone everywhere within a jurisdiction. Such standardization of law undermines legal pluralism in society.

In addition to studying internal legal culture, and the culture of legal professionals, Friedman explains legal culture in a broader sense, looking at the public's attitudes toward law. He refers to this as "external legal culture," or the legal culture of laymen, i.e. persons who do not study or practise law.⁵⁷ Those who study external legal culture investigate how people see the law, and this depends on their personal experiences with the legal system. An example of external legal cultural measurement is observation of public perception about the fairness of the legal system and people's willingness to comply with its requirements. I have separated Friedman's concept of external legal culture from legal consciousness with a very fine line; external legal culture is society's perception of law from a macro perspective, while legal consciousness illustrates individual experience and interaction with the law, as described in the work of David Engel, and Patricia Ewick and Susan Silbey.⁵⁸ According to this division, the CFM of the villagers and their legal consciousness belongs to the external legal culture concept, while attitudes and perspectives of government officers and legal professionals fit with internal legal culture.

The example of the difference between modern and traditional communities in Thailand and about how people's attitudes differ depending on where they live and what types of economies they have, reveals that people's interests are expressed by their attitudes and behaviours in the external culture; however, they also have to deal with the requirements of the internal legal culture. The public puts pressure on and communicates with legal professionals to change their internal legal cultures so that they suit public demands.⁵⁹ This is how external and internal legal cultures interact with each other. The messages that they send can be formal, as in the case of a legal document like a writ of *habeas corpus*, or informal, as in the case of protest against strict enforcement of the law of *lese majeste* - the crime of violating majesty.

⁵⁶ *Ibid.* at 218.

⁵⁷ Lawrence M. Friedman, "The Concept of Legal Culture: A Reply" in David Nelken, ed., *Comparing Legal Cultures* (Aldershot, UK: Dartmouth, 1997) 33 at 33-34.

⁵⁸ Ewick & Silbey, *supra* note 24; Engel & Engel, *supra* note 25.

⁵⁹ Friedman, *supra* note 39 at 223.

In his study of legal culture, Friedman describes two kinds of demands in society that shape legal culture: interests and rights claims.⁶⁰ Interests are the desires of people who want the same thing, such as when several political candidates run for the office of mayor. Another type of demand is a rights claim. For example, two people may claim that they have rights to the same piece of land, but only one can be correct based on the facts and the legal rules. At this point, a mediator steps in to judge the claim. The mediator, who is often a judge, has to be impartial, independent, and morally respectful. This example shows legal actions taken by ordinary people who react to the law in ways that serve their interests, and at the same time interact with legal professionals, who also serve people's interests. Researchers who study legal culture often use litigation as an example of how legal culture is expressed, but some studies also show other aspects of legal culture, such as, for example, how people exercise their rights under traffic laws. The study of legal culture can involve a variety of aspects of law, such as legal rights, legal reasoning, interpretation of law, and language of law. In this study, I will determine the interests of the three subject groups (villagers, government officials, legal professionals) relating to CFM. I will also investigate Thai legal culture by using CFM litigation to reflect on how ordinary people and legal professionals exercise the law concerning CFM.

The study of legal culture has expanded deeper by looking at how legal practice depends on nationality, region, ethnicity and many other factors, as illustrated in David Nelken's holistic view of culture.⁶¹ Nelken's work focuses on practices of state agencies, litigants and the interaction between legal professionals' beliefs and behaviours. Nelken also explains that legal family traditions influence legal thought and create uniform ideas among legal professionals. Historical patterns promote evolution of ideas, beliefs, and values that can be conceptualized and identified in each legal culture. According to those who study legal culture, legal cultural concepts, ideas, and forms cross borders and legal fields. Although Nelken critiques the legal culture concept as being vague, he agrees with Friedman that demands in society of people who are protecting their interests, or what Friedman calls external legal culture, will create changes in legal systems through internal legal culture.⁶² In this study, the complexity of Thai legal culture is illustrated by the differences between the beliefs and traditions of the hill tribes,

⁶⁰ *Ibid.* at 226.

⁶¹ David Nelken, "Toward a Sociology of Legal Adaptation" in David Nelken & Johannes Feest, eds., *Adapting Legal Culture* (Oxford: Hart, 2001) 7 at 17.

⁶² *Ibid.* at 19.

lowlanders and urban people, who have all been educated based on different knowledge sets. These differences have led to forest conservation conflicts.

Another approach to the study of legal culture is that of Roger Cotterrell,⁶³ who argues that Friedman's approach is unclear – that it is impossible to investigate holistic legal culture in society. Instead, Cotterrell recommends using legal ideology that connects to legal doctrines in order to view legal culture as a unity rather than as an aggregate.⁶⁴ However, if researchers base their concepts of legal culture on Friedman's approach about internal legal culture, Cotterrell suggests that this should be narrowed to apply to local or otherwise limited areas of study, which would be more manageable.⁶⁵

Friedman's response to Cotterrell is that his approach to investigating legal culture can be carried out by empirically researching individual states of mind in order to find attitudes and behaviours that affect the legal system.⁶⁶ Although the findings might be fragmented, at least they will portray part of legal culture and do not need to be applied to the legal system as a whole. In using legal ideology, Friedman agrees that researchers can investigate legal doctrines to see how they function in the legal system and how they impact the public.⁶⁷ In Chapter 6, I use legal ideologies from green legal theory, such as Crown land and common property, forest law and the public trust doctrine, to question how the law concerning environmental issues reflects legal culture.

Broader legal culture studies also look at legal mobilization as legal culture.⁶⁸ For example, people define their problems in legal terms when they turn to the law for help, such as when they call the police, or file a lawsuit. When people react in such ways, the social movements that rely on legal discourse, legal strategies and the study of legal culture describe these actions as "phenomena", which can be either positive or negative.⁶⁹ In the case of

⁶³ Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot, UK: Ashgate, 2006).

⁶⁴ *Ibid.* at 89-91.

⁶⁵ Roger Cotterrell, "The Concept of Legal Culture" in David Nelken, ed., *Comparing Legal Cultures* (Aldershot, UK: Dartmouth, 1997) 13 at 26.

⁶⁶ Lawrence M. Friedman, "The Concept of Legal Culture: A Reply" in David Nelken, ed., *Comparing Legal Cultures* (Aldershot, UK: Dartmouth, 1997) 33 at 35.

⁶⁷ *Ibid.* at 37.

⁶⁸ Silbey, *supra* note 11 at 356.

⁶⁹ Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994) at 92. See also David M. Engel, "Legal Pluralism in an American Community: Perspectives in a Civil Trial Court" (1980) 5:3 *American Bar Foundation Research Journal* 425.

negative phenomena, people will not use the law to help resolve their problems because, for instance, they might expect that nothing will be done.⁷⁰ Although this seems to be a very negative reflection on the legal system, it drives legal mobilization as people try to push the legal system to legitimate their actions, as when communities try to get their CFM legalized, or petition for a draft bill defending their constitutional rights to participate in natural resource management.

Legal mobilization in Thai society relating to CFM includes the environmental movement; political reform; constitutional reform, e.g. drafting the *Constitution of 1997*, and the *Community Forest Bill* movement; demanding land reforms that led to communal land title; and the cabinet resolution on forest people.⁷¹

An example of the study of legal culture in Thailand is “The Thai Cultural Constitution” by Nidhi Eoseewong.⁷² Since Thailand’s revolution in 1932, the constitution has been repealed 36 times and there have been 18 separate constitutions. Given this, the concept of supremacy of the constitution seems inapplicable in Thailand; however, the *Constitution* still contains some functions that work very well. Eoseewong explains that, although Thailand’s constitution is considered in fact as the supreme law of the land, the way it really exists in the practice of actual political institutions remains to be seen. Institutions in Thailand such as the monarchy, religion, the military, politicians, and law play their roles and interact. These institutions create the rules that have power in people’s everyday lives and these rules become legal culture; thus, when the written constitution conflicts with the “cultural constitution”, the written constitution will be ignored or terminated, just as some former constitutions of Thailand have been repealed or redrafted several times because, in fact, they were not the true supreme law of the land. Eoseewong’s approach is an application of legal culture theory in the Thai context. His explanations are relevant to the Thai legal system in terms of the legal institutions and the real functions of law concerning CFM and constitutional rights.

In summary, this is a macro view of legal culture, and uses empirical study methods to look at how the legal system is mobilized in society. The next section will describe green legal theory as an approach to finding legal culture by using legal ideology or legal doctrine as the

⁷⁰ McCann, *ibid.* at 2-3.

⁷¹ *Cabinet Resolution: Resolution on Forest Trespassing in Nakhornratchasima Province*, (22 April 1997), online: Government of Thailand <http://www.cabinet.thaigov.go.th/cc_main21.htm>.

⁷² Nidhi Eoseewong, “The Thai Cultural Constitution” in Nidhi Eoseewong, *Thai Nationality, Country, Textbooks, and Monuments* (in Thai) (Bangkok: Matichon, 1995) 136.

basis of analysis, as Friedman and Cotterrell suggest. My study uses green legal theory as the basis of analysis because it covers critical legal ideas about how environmental law is used in society, and is therefore suitable for my study of CFM as environmental law.

2.3 Green Legal Theory

Green legal theory (GLT) is an overarching critical legal theory that uses many legal ideologies and theories to review and improve the law concerning environmental issues.⁷³ It applies other legal ideologies and theories as its basis to examine whether the law functions to resolve environmental problems.⁷⁴ For example, GLT reconsiders the public trust doctrine that holds that the government is a trustee of natural resources on behalf of the public and this doctrine is embedded in many areas of law, such as the law of public domain and the law of common goods.⁷⁵ There are many perspectives from which GLT observes the law and legal systems, e.g. the foundations of environmental law, economic impacts and incentives, geographical dimensions, and eco-politics. Green legal theorists criticize environmental law and seek alternatives to the new natural law, such as: indigenous peoples' perspectives on conservation, Eastern philosophy, "bottom up" approaches, and grassroots participation.⁷⁶

GLT is the main theory I use in looking at CFM, as the main objectives of CFM are natural resource management and forest conservation. The law concerning CFM consists of a set of statutes on topics as varied as constitutional law, forestry law, and environmental law. Understanding the implementation of CFM does not only involve knowing the relevant statutes, but also involves comprehending the context of ideologies and legal doctrines affecting people's participation, government power, and the political, economical and social influences on CFM. This kind of analysis is central to GLT. For this reason, I employ GLT as a framework to guide my arguments.

⁷³ See Michael M'Gonigle & Paula Ramsay, "Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation" (2004) 14 *Journal of Environmental Law & Policy* 331.

⁷⁴ Sean Coyle & Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Portland, OR: Hart, 2004) at 1-6.

⁷⁵ Mary Christina Wood, "Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generation (Part 1): Ecological Realism and the Need for a Paradigm Shift" (2009) 39 *Environmental Law* 43.

⁷⁶ M'Gonigle & Ramsay, *supra* note 73 at 332.

The following section provides basic information about green legal theory. GLT shares the naturalist belief that environmental law is not sufficient to keep the balance between humans and nature;⁷⁷ further, it points out the weaknesses of environmental law and suggests that society needs to reform the legal system concerning the environment crisis.⁷⁸

The law that governs environmental issues is limited in its ability to deal with growing environmental problems. GLT considers that law needs urgent revolution. It proposes a broad ecosystem-based legal doctrine, holistic institutionalization, and rearrangement of human activities to create a more sustainable way and to use nature wisely.⁷⁹ The law should be expanded to be ecosystem-based and community-based, which is more sustainable.⁸⁰ According to GLT, the law of natural resource management that is concerned only with the benefits from industry should be reviewed from the wider perspective that production and consumption are systematic in nature.⁸¹ I posit that these ideas from GLT can be applied to state forestry law and CFM to reveal a more suitable mechanism to manage the forest based on ecosystems and communities.

To make suitable law concerning environmental management for each community, GLT looks at the law on two levels. The first level is the content of the law, which needs to cover every aspect of the environment: pollution, energy, and natural resources. The content of law must also cover every mode of production: industrial, agricultural,⁸² service-based, and household-based. In my view, this critique suggests that the regulations concerning CFM should be holistic, providing aspects of management such as ecological monitoring systems. The second level is implementation and is concerned with the processes that need participation at every scale, locally, nationally and globally. In the Thai context, I believe that local, regional and national participation in forestry conservation could benefit from using CFM. The criticizing of law concerning environmental issues occurs in every society. Therefore, considerations for making suitable law in each society include: balancing the benefit and burden of law in every section of society for businesses, consumers and suppliers; and being

⁷⁷ Jane Holder, "New Age: Rediscovering Natural Law" (2000) 53 *Current Legal Problems* 151 at 152.

⁷⁸ M'Gonigle & Ramsay, *supra* note 73 at 350.

⁷⁹ *Ibid.* at 333.

⁸⁰ *Ibid.* at 334.

⁸¹ Bradley A. Harsch, "Consumerism and Environmental Policy: Moving Past Consumer Culture" (1999) 26 *Ecology Law Quarterly* 543 at 546-547.

⁸² "Agriculture" is used broadly here to mean cultivating, farming, and hunting.

concerned about the social side of law, which will make for more efficient law enforcement. This last part will require the efficient allocation of property rights.⁸³ Land rights – as part of property law, land law, and forestry law – are fundamental to this study. Land rights include the right to use natural resources such as forests and are the main source of the conflict between forest dwellers and government agents enforcing the limited use of Protected Areas (PAs).⁸⁴ The land rights that are the subject of this study are not concerned with ownership but with the right to use the land based on continuous occupation. However, these use rights need to be limited in order to maintain the ecosystem.⁸⁵ Equally complicated problems stem from dysfunctional land allocation management and recognition of communal rights in the public domain.⁸⁶ I will discuss this in more detail in Chapter 3.

GLT also suggests the need for institutional reform. Institutional reform means integration of the law with other disciplines that are concerned with environmental ethics. Reform begins with geography, which extends its concern to space and place in nature. Political ecology takes into account a cultural and social analysis in building sustainable political economies.⁸⁷ An example of integration can be seen in the legal designation of PAs.⁸⁸ PAs have an obvious geographic element, but they also play social and ecological roles; society must weigh the biodiversity function and the social function in deciding whether to designate a forest as a national park or PA. A more holistic approach will resolve the fragmenting of environmental agencies from the past. Reconstruction, as legal naturalism suggests, needs to be imposed seriously, especially on corporate and bureaucratic power.⁸⁹ My field research

⁸³ M'Gonigle & Ramsay, *supra* note 73 at 347. ,

⁸⁴ Reiner Buergin, *'Hill Tribes' and Forest: Minority Policies and Resource Conflicts in Thailand*, SEFUT Working Paper No.7, Socio-Economics of Forest Use in the Tropics and Subtropics (Freiburg: University of Freiburg, 2000), online: University of Freiburg <<http://www.freidok.uni-freiburg.de/freidok/>>.

⁸⁵ "Indigenous Peoples and Protected Areas in Thailand: A Review" (10 January 2011) Inter-Mountain Peoples' Education and Culture in Thailand Association, online: Forest Peoples <http://www.forestpeoples.org/sites/fpp/files/news/2011/01/Media%20briefing_Thailand_IPs_and_PAs_Sharing_%20Power_2011_Eng.pdf>.

⁸⁶ Anan Ganjanapan, *Community Dimension: Local Epistemology on Rights, Power, and Natural Resources Management* (in Thai) (Bangkok: Thailand Research Fund, 2001).

⁸⁷ M'Gonigle & Ramsay, *supra* note 73 at 353.

⁸⁸ Nigel Dudley, ed., *Guidelines for Applying Protected Area Management Categories* (Gland, Switzerland: International Union for Conservation of Nature and Natural Resources, 2008); Philip Dearden, "Park Literacy and Conservation" (1995) 9:6 *Conservation Biology* 1654 – 1656..

⁸⁹ M'Gonigle & Ramsay, *supra* note 73 at 341.

interviews will show that government officers want to reorganize their departments because of fragmented and unsuitable structures in government natural resource management agencies.⁹⁰

To give an example of the application of GLT to natural resource management, the laws that govern the forest often come from state-based law. Moreover, policies about forest management tend to be economically oriented, for instance by allowing logging licences in the forest. This would be a good area in which to apply the principles of reconstruction to create an ecologically-based legal system. One alternative would be to apply the law beyond the boundaries of individual countries. Another possibility would be to look at the benefits from forest resources in an expanded way: instead of just being about contractual relations, forest management would be concerned with the public interest in terms of productivity.⁹¹ Also, monitoring the implementation of law by using ecological measurement is highly needed in situations of degradation of biodiversity. All of these critiques are true of Thai forestry law and of the *Community Forest Bill*, especially regarding legal principles and enforcement.

In making change for the benefit of ecological systems, societies also have to consider the connections between the law, nature, production, consumption, and the distribution of wealth. Institutional restructuring within society should include reforming both formal legal constitutions, which are the basis of rights, and informal institutes within society in order to better serve the environmental movement. GLT points out that environmental law is based on the fundamental legal concept of individual property rights⁹² and on science-based knowledge,⁹³ but argues that these concepts should be expanded. The public interest should balance private interests in property so that concern for sustainability and ecological protection is increased.⁹⁴ Also, laws that privilege science-based knowledge should not triumph over traditional laws and local knowledge.

GLT proposes ways to apply its critique in practical terms. First, it argues for a public movement. GLT believes that economics and ecology can be united. The old tools in the law are still useful, such as: polluter pays principles, precautionary principles, tax incentives and subsidies. In addition, new legal mechanisms and policies promoting sustainability need to be

⁹⁰ See more detail in section 5.1.1.5, below.

⁹¹ M'Gonigle & Ramsay, *supra* note 73 at 345-346.

⁹² Coyle & Morrow, *supra* note 74 at 12-13.

⁹³ Holder, *supra* note 77 at 152; see also Coyle & Morrow *supra* note 74 at 213-215.

⁹⁴ M'Gonigle & Ramsay, *supra* note 73 at 347.

created. Thus, GLT provides practical tools to deal with the ecological crisis. Moreover, GLT connects with local people and values traditional knowledge.

As GLT criticizes the law concerning environmental issues, I apply this theory as a guideline to investigate the law concerning CFM implementation in Thailand. At the same time, this guideline functions as an overview of this area of law. Applying GLT to this study of CFM implementation, I select five branches of GLT critique that I will use to establish basic concepts and arguments. The first is the new naturalism, the foundational concept in which GLT embedded its thoughts and through which it has developed its environmental conservation critiques. The second is the state power concept, which criticizes environmental and natural resource management, in the way that GLT criticizes and analyzes environmental law. The third is a set of considerations of the commons as an object of study; from this viewpoint, GLT focuses on people's collective participation in managing natural resources, such as the creation of community forest trusts. The fourth is legal pluralism, which GLT proposes as an approach to promoting environmental conservation through the law. The final concept I will discuss is indigenous critical legal theory, as GLT values indigenous peoples and their ways of thinking in preserving natural resources and simultaneously protecting their rights. GLT uses indigenous peoples' concepts as alternative legal methods to fill the gap in law implementation. The following five sections will provide an overview of the new naturalism, the state power concept, ideas surrounding the commons, legal pluralism, and indigenous critical legal theory – all tools used by GLT to critique the law concerning environmental conservation.

2.3.1 The New Naturalism: Environmental Philosophy

Natural law theory seeks to explain the relationship between humans and nature, and it has been used as a foundational ideology for the critique of environmental conservation law.⁹⁵ After environmental laws were implemented in North America in the 1970s, green legal theorists began to question their enforcement – and to enhance the new naturalism.⁹⁶

From the GLT point of view, the fundamental concept of law concerning environmental conservation is natural law, especially the new naturalism.⁹⁷ The new naturalism reinterprets

⁹⁵ Richard J. Lazarus, *The Making of Environmental Law* (Chicago: University of Chicago Press, 2006) at 50.

⁹⁶ David J. Willis, "Ecophilosophy and Natural Law" (1992) 12 *Journal of Energy, Natural Resources & Environmental Law* 419 at 419.

⁹⁷ Michael M'Gonigle, "A New Naturalism: Is There a (Radical) 'Truth' beyond the (Postmodern) Abyss?" (2000) 8 *Ecotheology* 8.

the ideas of classical naturalism for the postmodern era. In some ways, it tries to balance the supernaturalism of classical naturalism with the postmodern view that there is no ultimate truth, by arguing that there is truth (although not “divine” truth), only we cannot see it yet. Moreover, according to naturalism, humans can only discover the rule of nature but cannot change the pattern of the rule.⁹⁸ This means that humans cannot conquer nature. In addition, naturalism explains the law based on rationality, not on divinity.⁹⁹ I use the concept of new naturalism to support people’s CFM by explaining the source of CFM rights and the need to exercise those rights in a sustainable way.

While classical naturalism supports hierarchy, the character of the new naturalism is one of being-in-relation and non-hierarchical universalism. This relation is unity-of-being in the diversity-of-other. The diverse “universalism” of neo-naturalism shares the truth from individual experiences of connectedness. This concept seems to be broad and accepting of cultural differences between Western traditions and Eastern societies. Basically, naturalism believes that there is common ground between every society's rules, but that each society has to make its own way according to fundamental rules.¹⁰⁰ Each society has to find its own answers about how to operate communities as whole structures within the framework of naturalism. In this sense, each society has more space to find suitable rules for itself and, in this regard, neo-naturalism is similar to legal pluralism. To apply this concept to my study, even though Thai society is still hierarchical, the concept of non-hierarchy and being-in-relation is an ideal way to foster cooperation between communities and government officers with respect to CFM.

Being-in-relation applies to CFM in terms of the relationship between communities and government officers in forest conservation. At the same time, acceptance of others and of the differences between communities is also important in applying their traditions and beliefs in nature. It is important to differentiate between the tribes of indigenous people (hill tribes), who have different cultures and ways of living in the forest. Hence, applying new naturalism to this study also connects with legal pluralism and indigenous critical legal studies.

Naturalism supports the view that communities must conduct their activities with respect for the capacities of nature and not over-exploit it. In practice, social institutions have

⁹⁸ *Ibid.* at 12.

⁹⁹ *Ibid.* at 16-17.

¹⁰⁰ *Ibid.* at 14.

to consider the relationships between the political community and the physical environment. Since the beginnings of industrialization, when humans invented technologies and developed social theories supporting their efforts to consume the world's natural resources, naturalists have believed that we must have a more ethical way to conduct our activities.¹⁰¹ Thus, acceptance of the new naturalism by CFM practitioners is an important pre-condition to sustaining the ecosystem. If all of the communities practise ethical consumption, then they will find a way to resolve the deforestation crisis.¹⁰²

GLT proposes same idea as the new naturalism: to reorganize the relationship between humans and nature. The law – not only environmental law, but law in general – needs to understand nature and the ecosystem. People need to engage more in the legal process, especially the legislative process, to make sure that society has ecologically-based laws. Because the movement ought to collectively self-organize,¹⁰³ and co-operate harmoniously in every aspect, especially in political and economic systems, this process requires that people have a clear comprehension of social structure, culture, and the environment. It might not be as easy as “add environment and stir”.¹⁰⁴ Rather, the process needs public ecological co-consciousness, and recognition of the value of nature. The GLT perspective explains how to nurture people’s consciousness about respecting nature. For example, NGOs and environmentalists try to educate and inform people about environmental issues. At the same time, natural resource managers also have to consider people’s livelihoods and their survival; for example, this is the task of coordinators of the Thai Royal Projects when working with highlanders. In this respect, GLT is in line with legal mobilization concerning CFM and legal consciousness of forest communities. I will integrate these concepts in Chapters 4 and 5.

The concepts of new naturalism are similar to Asian beliefs such as Buddhist concepts of interconnectedness and respect for nature, reason, moral truth, and being-in-relation. Dictates of Buddhism and Mahatma Gandhi¹⁰⁵ to be modest and adjust ourselves to nature align with

¹⁰¹ Willis, *supra* note 96 at 423.

¹⁰² In Chapter 4, in sections 4.1.3, 4.2.2, and 4.3.5, I discuss how the selected communities work with their CFM regulations.

¹⁰³ M’Gonigle, *supra* note 97 at 13.

¹⁰⁴ *Ibid.* at 14.

¹⁰⁵ For example, Mahatma Gandhi’s philosophy inspires Asian environmentalists who support sustainable development: “Earth provides enough to satisfy every man’s need, but not any man’s greed.” Mahatma Gandhi (2 October 1869 – 30 January 1948). See Anindita Basak, *Environmental Studies* (Delhi: Dorling Kindersley, 2009) at 182.

new naturalism and suggest that we can manage natural resources sustainably and still survive in the modern world. In the Buddhist context, even though there is no god, there is the highest rule of nature which contains ultimate truth¹⁰⁶ and which everyone has to follow. This explanation helps to emphasize the role of the beliefs in Thai society that are reflected in this CFM study. These beliefs have been used as law enforcement tools by the villagers in drafting their CFM regulations.¹⁰⁷

The new naturalism has increasingly respected traditional and local knowledge¹⁰⁸ in the more complex multicultural societies that are comprised of people with different belief systems. Respect for different ways of “knowing” is linked to concepts promoted by indigenous critical legal theory. When lawmakers value the diversity of beliefs, and act according to law, not only the lawmakers but the general public have to respect local knowledge. For example, I hope that my field research interviews with the selected communities about their practices with respect to the spiritual forest and their understandings of nature will become more widely known, especially among Thai legal professionals. According to the naturalist perspective, if an indigenous forest community preserves its trees because members believe that the forest contains a spirit, national forestry law should recognize this practice rather than fine the community for trying to prevent outsiders from logging in their territory. The logging companies themselves should have to respect the tribe's laws but, if they do not, state law can help to enforce the local traditional law.

Eco-naturalism is a branch of neo-naturalism concerned specifically with environmental issues. In the eco-natural critique, society needs to radically change to defend Mother Nature. The ecosystem-based management approach¹⁰⁹ acts as a guardian of the ecosystem using economic and political processes. For example, citizens could push the government to enact legislation reducing the tax on green products, or providing the business sector with incentives to recycle paper. When development and economic growth become unbalanced and unfair, laws prescribing ecosystem-based management will hopefully prevent wrongful activities and will protect the sustainability of the environment by reshaping the human relationship with nature. For example, when large-scale fishing companies deploy high-capacity ships in large

¹⁰⁶ For example, karma, and the cycle of birth and death.

¹⁰⁷ I will illustrate this implementation in section 4.1.3.2 and 4.2.5.1.

¹⁰⁸ M'Gonigle, *supra* note 97 at 33.

¹⁰⁹ *Ibid.* at 21.

numbers so they can catch more fish and make more money, their economists will only calculate how the companies can increase their productivity without caring whether the fish will become extinct. If the fish in that area have gone, the company will move to another place and leave the catastrophe behind. This situation is becoming more common in developing countries such as Thailand.

New naturalism and eco-naturalism try to come up with explanations and solutions for these kinds of problems. For instance, in the above situation, people could try to change the law so that fisheries are regulated and companies are not allowed to fish in the season when the fish lay their eggs. This solution-oriented concept in naturalism also resembles concepts in GLT. The characteristics of neo-natural law and eco-naturalism described above show a concern for nature. Naturalists propose a practical way to fight for the human-nature relationship. New naturalism theory does not only cover social relations, but it goes beyond the abstract sphere into the real world.¹¹⁰ Eco-naturalism explains the law as “*descriptively true*, comparable to the way that the law of gravity applies to all matter”.¹¹¹ Also, lawyers must perceive the law as it is, not as they believe or want the law to be. This concept may enhance CFM practice in Thailand and its enforcement in the legal system.

In environmental ethics, there are many approaches to environmental management; these differ based on their values.¹¹² For instance, anthropocentric utilitarian ethics views humans as central to resolving the environmental crisis and explains that the objective of resolving environmental problems is to benefit humans and improve their lives.¹¹³ On the other hand, an environmental philosophy that believes in the rights of non-human natural entities, called biocentric or lifeform-centered ethics, has developed alongside anthropocentric ethics.¹¹⁴

¹¹⁰ *Ibid.* at 12.

¹¹¹ Willis, *supra* note 96 at 427.

¹¹² Alyson C. Flournoy, “In Search of an Environmental Ethic” (2003) 28 *Columbia Journal of Environmental Law* 63 at 80.

¹¹³ Environmentalists who propose anthropocentric utilitarian ethics include Bryan G. Norton and Eugene Hargrove, but their work has been loosely focused on objectives and processes for environmental conservation. Many environmental philosophers focus more on the non-human world in terms of costs and benefits of environmental economies and try to understand more about the coherence of ecosystems – so called “ecological utilitarian ethics”. There is also an anthropocentric ethics that is based on a human rights and legal perspective and promotes distributive justice. This is known as “anthropocentric rights-based ethics” and uses environmental laws as a guideline. *Ibid.*

¹¹⁴ This environmental philosophy tries to advocate for non-human subjects such as ecosystems, and was later called “holistic biocentric ethics”. There are more divisions within environmental ethics, such as ecological communitarian ethics, which are based on the principle that humans and non-humans need to work together with integrity; individualistic biocentric theories that promote the rights of non-human

These two philosophies use different means to achieve the same end – environmental conservation. My objective in illustrating these types of environmental ethics is to understand, not to judge their value. In my view, extreme belief in a particular perspective is not productive, and society should balance these ethics. Too much of a human focus is not good because it will undermine other living things. Too much of a biocentric focus is not good because humans will suffer economically, especially marginalized people. The belief that technology will resolve environmental problems without human effort is not the way to resolve the environmental crisis either. However, this review of environmental ethics helps in understanding various groups in Thai society when it comes to the debates on environmental issues such as the *Community Forest Bill* and CFM practice, as well as the concept of relocating people from the forest.

In terms of trying to achieve conservation, green legal theorists suggest that humans rely too much on technology. Jane Holder critiques the technology-based human relationship to nature.¹¹⁵ Humans use science and technology to dominate nature, such as when they create genetically modified organisms. However, scientific technology separates humans from nature. In fact, most laws governing the dynamic relationship between humans and nature often allow humans to violate the laws of nature. Environmental laws usually reflect and are dependent on the classical scientific views of universality, rationality, and objectivity, and are thus narrowly self-limited in their ability to resolve environmental problems.¹¹⁶ Moreover, Holder states that “the effect of modern environmental law is to fragment, individualize, and externalize nature such that it remains ‘other’.”¹¹⁷ Therefore, a solely techno-centric approach to environmental law cannot control the over-exploitation of natural resources. An example can be found in the case study on the global warming case, in which the RFD used calculations of carbon credits to claim civil compensation from the people who were sued for forest trespassing.¹¹⁸ But this kind of law enforcement leads to devastation of poor people and drives them over the edge, which might lead to social disruption.

individuals, i.e. animal rights; and ecofeminism, which uses an approach that emphasizes gender roles in environmental conservation. *Ibid.* at 82- 83.

¹¹⁵ Holder, *supra* note 77 at 152-153.

¹¹⁶ *Ibid.* at 152.

¹¹⁷ *Ibid.* at 167.

¹¹⁸ See more detail in Chapter 6, section 6.2.2.5, below.

The next consideration of the new naturalism is social power as collective action. Because it is self-reinforcing once in place, collective action is the answer to natural resource management problems. Individual acts are simply not enough to solve environmental problems; in fact, citizens need strong political will to drive change.¹¹⁹ Thus, increasing support for CFM and protection of the forest will require legal mobilization.

The basis of naturalism is that nature is a self-sustaining circular system. To illustrate, nature has “recyclable” resources which can rebuild themselves – for example, animals and plants. (However, some living cycles are irreversible due to over-exploitation, as in the case of extinct wildlife.) On the other hand, the development of economic and social systems is linear, and leads to the maximum benefit for business sectors, but maximum exploitation of nature. Therefore, society must reconstruct the production system to act in accordance with the laws of nature.

In summary, naturalism is the philosophical basis for legal theory based on the relationship between humans and nature. Natural law has developed the morality of human activity related to nature by encouraging engagement in collective action, and by helping to create the ecology movement and “ecological law”. Neo-naturalists call for the reconstruction of the law of the environment and for radical change in human activity related to Mother Nature.

In addition to the new naturalism, the legal concepts that best explain the relationship of CFM to Thai legal culture based on GLT are: state power – as the law relies on state power and centralization, which later causes conflicts with the local people regarding law enforcement; the commons, as a description of the collective action of the people in managing the common good, such as forests and land; and legal pluralism and indigenous critical legal theory, which support participation in natural resource management.

2.3.2 State Power: Governing Natural Resources

In the previous section, I intentionally used the new naturalism to contest the positivism that dominates the Thai legal system. In this section, I will explore concepts of state power that relate to natural resource management by analyzing the implementation of law through legal and social structures. GLT looks at how state power manipulates environmental law, including the law concerning natural resource management such as forestry law. Thai state management

¹¹⁹ Collective action is also required in every legal theory described in the following sections.

of forest areas takes a positivist and top-down approach.¹²⁰ This is in contrast with the concept of the commons, which I have chosen to discuss immediately afterwards (section 2.3.3) in order to provide a different point of view on governance of forest areas.

State power has been a fundamental concept in mainstream legal theories, has formed the structure of the government and has dominated Thai society until the present day. There are many layers of legal concepts that govern forest areas. For instance, forest areas are categories of land and are thus governed by land management laws. On the other hand, forests are natural resources that the state has used in the past as a source of revenue and that are considered as part of the ecosystem and are thus governed by environmental laws. In this section, I examine three separate concepts of state power over lands, forests, and natural resources that grant the state the power to manage forest areas: feudalism, imperialism, and the public trust doctrine.

Green legal theorists point out that law concerning property is directly related to environmental issues.¹²¹ One of the debates in environmental law is about how to distinguish between public and private property rights. The law divides land into public land and private land, and different ideologies govern each category. This is the case in Thailand, where property law has been inherited from Roman and European legal concepts.¹²² Roman-based law uses the code law system and has been modified for use in common law systems as well.¹²³ This ideology of public domain versus private property rights has shaped the social order through feudal rights and the duties of the people. Surprisingly, feudal systems have not only existed in Western legal thought, but are also evident in Eastern legal manuscripts as well. For example, the *Law of Manu*, in the Hindu legal family, espoused feudalism, and this concept influenced Lanna and Siamese legal texts and still remains in modern Thai law in the guise of

¹²⁰ When I use the words “forest” or “forest area”, I am speaking generally. “Forest” means a complex ecological system in which trees are the dominant life-form. Encyclopedia Britannica, s.v. “Forest” online: Encyclopedia Britannica <<http://www.britannica.com/EBchecked/topic/213461/forest>>.

In Chapter 3, I will discuss in greater depth the meaning of “forest” under Thai law. There are three types of forests under Thai law: forest reserves, national parks, and wildlife sanctuaries. Thailand also has three types of PAs: national parks, wildlife sanctuaries, and non-hunting areas (which can be anywhere, not only in forest areas). The word “forest” under the *Land Code* means land that is not subject to any person’s legal possession or ownership.

¹²¹ Coyle & Morrow, *supra* note 74 at 3.

¹²² René Guyon, *The Work on Codification in Siam* (in Thai), trans. by Surapon Triwit (Bangkok: Winyuchon, 2002) at 153

¹²³ Coyle & Morrow, *supra* note 74 at 11.

Crown land.¹²⁴ The significance of feudalism to land rights, including rights to manage forest areas, is that it establishes the concept that the land belongs to the Crown or the king and private ownership can be granted only by approval from the Crown.

Feudalism developed from tribalism when people started to gather in communities before the development of towns, and had three essential features: vertical divisions of sovereignty; agrarian modes of production; and status of rulers as powerful lords rather than as kings.¹²⁵ In Europe and Southeast Asia, including Thailand at the time of Lanna and Siam, these components of feudalism established the land tenure system. Rationales for the feudal system were taxation, and military control to provide security for rulers from competing counterparts, or from central regimes.¹²⁶ The feudal system declined when private ownership was widely established via the modern legal system, which viewed land as a commodity.¹²⁷ According to the *Mangraisart*, Lanna rulers used the feudal system for land use management in northern Thailand.¹²⁸ In the past, people escaped from oppression that the rulers imposed by taxation; they wanted to be free from the feudal system and own land as they wished.¹²⁹

Although feudalism has formally ended, its influences still exist in modern laws concerning land and environmental resource management.¹³⁰ There is an environmental movement that uses “new feudalism”, which holds that “the land is a resource, not commodity” and “land owners are really land holders, who must exercise stewardship for the benefit of the broader community and unborn generation.”¹³¹ This is a form of common goods management

¹²⁴ See *Mangraisart, or the Law of King Mang Rai* (in Thai) (Wat Saw Hai, Sarapuri Manuscript, 1799), trans. by Prasert NaNakorn (Bangkok: History Department of Srinakharinwirot University, 1978); Robert Lingat, *History of Thai Law* (in Thai), Chanvit Kasetsiri & Wikan Phongphanitanon, eds. (Bangkok: Social Sciences and Humanities Foundation for Thammasart University, 1983), vols. 1 & 2.

¹²⁵ Michael Stuckey, “Feudalism and Australian Land Law: ‘A Shadowy, Ghostlike Survival?’” (1994) 13:1 *University of Tasmania Law Review* 10 at 103.

¹²⁶ David A. Thomas, “Origins of the Common Law (A Three-Part Series), Part III: Common Law Under the Early Normans” (1986) *Brigham Young University Law Review* 109 at 115-116.

¹²⁷ Charles Sumner Lobingier, “The Rise and Fall of Feudal Law” (1933) 18 *Cornell Law Quarterly* 192 at 217.

¹²⁸ *Mangraisart*, *supra* note 124.

¹²⁹ James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven: Yale University Press, 2009).

¹³⁰ Bruce Yandle, “Escaping Environmental Feudalism” (1992) 15 *Harvard Journal of Law & Public Policy* 517 at 525.

¹³¹ John McClaughry, “The New Feudalism” (1975) 5 *Environmental Law* 675 at 676.

and is very similar to collective rights of the commons. The lord from feudal times has been transformed into the national assembly that manages natural resources in modern society.¹³²

Currently, in actual terms, the new feudalism consists of large industrial companies occupying vast pieces of land, reducing the chances of small private entities and individuals to acquire land, thus causing disadvantage.¹³³ According to capitalist thought, land is a commodity instead of a resource that everyone in society can access. Some propose the idea of a new feudalism that can go back to the concept of usufructuary interest, so that people can benefit from the land without ownership.¹³⁴ The idea of feudalism returned to Thai society when the landless farmers' movement, which the CFM movement also supported, proposed that land is a resource and that land holders must exercise stewardship for the benefit of the broader community and the next generation. In the CFM movement, which struggles with formal implementation of law concerning CFM, the people have moved toward the ideas of communal land title and the right to use the land, even though that land may be located in PAs.¹³⁵

However, the state-based character of feudalism is to nationalize environmental assets and monopolize the right to manage the land, with social hierarchies to determine who can benefit from the land.¹³⁶ Feudalism posits that decision making depends on the ruler, or now on government administration, and also still retains the concepts of taxation and public trust duties regarding the use of natural resources. In the past, in northern Thailand, lands were held communally and were managed by rulers on behalf of the people, who were permitted to use the land for farming for a period of time.

Despite some of its positive characteristics, feudalism could cause overexploitation of natural resources and absence of land security for individuals. Nevertheless, the communal land title movement in Thailand uses new feudalism to secure land rights of villagers who practise CFM. However, I am suspicious of the source of legitimacy of the communal land title

¹³² Yandle, *supra* note 130 at 537.

¹³³ Richard J. Lazarus, "Debunking Environmental Feudalism: Promoting the Individual through the Collective Pursuit of Environmental Quality" (1992) 77 *Iowa Law Review* 1739 at 1743.

¹³⁴ McClaughry, *supra* note 131 at 676-678.

¹³⁵ For more details see discussion in section 3.4.

¹³⁶ Lazarus, *supra* note 133 at 1747.

project in PAs.¹³⁷ Feudalism does not resolve the dilemma in property and environmental law of private vs. public ownership. Many environmental problems result from the kind of private property management that depends on absolute ownership; this is why environmental law uses sanctions against public authorities as a tool to control the causes of environmental degradation. On the other hand, the administration uses its power to grant private use of public lands for specific commercial purposes.¹³⁸ Resolution of the public/private dilemma might depend on the communal management of the environment, including communal natural resource management, but because local communities still have many challenges in running their local governments under the shadow of large industrial or commercial entities, this approach may require rigorous monitoring. This issue of new feudalism or communal land management becomes part of legal mobilization in Thai society and CFM advocates have also joined this movement because the people hope to secure land rights.

Another rationale for state power over natural resource management that has been inherited from the colonial era is imperialism. The definition of "imperialism" I am applying here is, "The creation and maintenance of an unequal economic, cultural and territorial relationship, usually between states and often in the form of an empire, based on domination and subordination."¹³⁹ This definition applies to Western countries that have colonized or dominated other countries, but can refer to any situation in which one state dominates another state's sovereignty and dictates to that state how it should govern its lands and people. Examples of imperialism include annexation of neighbouring states by the former Soviet Union and communist China, Japanese economic domination, and the export of capitalism from developed countries. Thus, in modern society, "imperialism" can refer to trade empires and informal political influences, called "informal and interactive" imperialism.¹⁴⁰

Another example of imperialism is Siam's colonization of Lanna and its influences on legal administration in northern Thailand before it eventually became part of the nation state of Siam. Lanna developed from a tribal community to a group of townships under King Mangrai

¹³⁷ I support the view that the commons is the source of people's rights to land and to manage the forests as stewards, not state policy, which may stimulate transfers of common land to private ownership.

¹³⁸ Lazarus, *supra* note 133 at 1750.

¹³⁹ Ronald John Johnston, *et al.*, *Dictionary of Human Geography*, 4th ed. (Malden, MA: Blackwell, 2000) s.v. "imperialism".

¹⁴⁰ James Tully, "Modern Constitutional Democracy and Imperialism" (2008) 46 *Osgoode Hall Law Journal* 461 at para. 3.

and then was colonized by Burma and Siam, then, at last, reformed into the modern state of Siam. Besides Siamese imperialism, the Thai legal system has also been influenced by imperialism from Western legal systems via legal codification, international relationships and globalization.¹⁴¹

Imperialism has the effect of subalternizing society, resulting in legal implants in colonized states, which in turn results in the creation of laws that may be incompatible with the structures of the colonized societies. In order to have effective implementation, it is important to establish some form of legal ideology in society and to embed it into the legal culture of the people. Imperialist regimes have three methods of replicating their laws in other societies: implanting legal ideologies in colonies by drafting constitutions, or other foundational documents; building formal infrastructures of imperial law, like creating imperial contracts for the licensing of natural resources; and establishing informal imperialism¹⁴² through mechanisms like agreements and commitments under imperial treaties.¹⁴³ Using these three approaches, imperialist law will impose itself on subaltern countries and overrule indigenous legal orders. Imperialist law can also take the form of international human rights laws and environmental regulations. This is imperialism from the level of international law.

Thus, state power can come from the national level, based on centralization and previous colonization, as when, in the 1870s, Siam took over British logging licensing management from Lanna; and from the international level, based on such current agreements as the *Convention on Biological Diversity*.¹⁴⁴ Both levels of imperialism impose state power over natural resources – forests – and take away the people's rights to manage these resources. However, there may still be good reasons behind these actions, such as maintaining ecosystems and biodiversity.

James Tully remarks on how to unfold imperial law into society from within a community by applying legal pluralism. For example, it may be possible to adapt a democratic constitution

¹⁴¹ I will explain this in detail in Chapter 6, section 6.2.1.

¹⁴² I use the phrase "informal imperialism" to describe the situation in which there is no direct takeover of a country but where one country creates conditions that another country has to follow, i.e. via free trade agreements and international treaties, without having a chance to alter those conditions. This implies a loss of free will and this is a form of indirect colonization. Of course, countries can still decide whether they want to participate in such agreements or treaties.

¹⁴³ Tully, *supra* note 140 at para. 30-33.

¹⁴⁴ Sarasawadee Ongsakul, *History of Lanna*, 6th ed. (in Thai) (Bangkok: Ammarin, 2007); Warren Y. Brockelman, "Bioprospecting in Thai Forests: Is It Worthwhile?" (Paper presented to the International Conference on Biodiversity and Bioresources: Conservation and Utilization, Phuket, Thailand, 23-27 November 1997), online: International Union of Pure and Applied Chemistry <<http://old.iupac.org/symposia/proceedings/phuket97/brockelman.pdf>>.

that was imported via colonization even if it does not fit well with the pre-colonial structures of society; this can be done by members of the original society challenging, discussing, and adjusting the imperialist elements of the imposed law. There are ordinary people who make huge impacts by changing systems from within, such as Mahatma Gandhi, Kofi Annan, Vandana Shiva, Masanobu Fukuoka, Fritz Schumacher, and Thich Nhat Hanh. Another method is to use something other than the colonial law that is imposed.¹⁴⁵ This can be done only if communities have the right to do so, because sometimes they are bound by “superior” laws such as international statutes and treaties. Tully’s suggestion applies to this study in that the communities who practise CFM can also contest state power and its attempts to control the forest.

The last legal concept I will discuss that generates state power to govern natural resources is the public trust doctrine. This doctrine means that the state manages natural resources for the benefit of both present and future generations; therefore, the public good cannot be transferred out of public ownership.¹⁴⁶ Basically, state power over public goods management comes from the public trust doctrine, which grants police power¹⁴⁷ and stipulates that the state should be a trustee for public goods like eco-systems and natural resources. However, green legal theorists argue that implementing only the public trust doctrine is not enough and cannot succeed in resolving environmental problems.¹⁴⁸ Under Thai law, the public trust doctrine is a major principle for managing common property, including natural resources under state forestry laws. This is connected to the concept of public domain under the *Civil and Commercial Code*.¹⁴⁹ In this study, I contest the extreme interpretation of the public trust doctrine in Thai legal culture that excludes people’s participation in forest conservation. As my

¹⁴⁵ *Ibid.* at para. 40.

¹⁴⁶ Wood, *supra* note 75 at 68.

¹⁴⁷ “Police power” refers to a concept of state power under the U.S. constitutional law that allows the state to exercise its power under the permissible scope of law. This is the case even though this exercise of power may affect the rights of the people to maintenance of health, safety, morals, and the general welfare of the public, including the environment and the ecosystem. Encyclopedia Britannica, s.v. “Police Power”, online: Encyclopedia Britannica <<http://www.britannica.com/EBchecked/topic/467323/police-power>>.

Thai public law also applies the concepts of police power; sometimes, it is called public power. See Worapoj Wisarutpit, *Rights and Liberty in the Constitution: Limitation of Rights and Liberty* (in Thai) (Bangkok: Winyuchon, 1995).

¹⁴⁸ Wood, *supra* note 75 at 56.

¹⁴⁹ See more detail in Chapter 3, section 3.2.2.

field research interviews illustrate, CFM as a form of regulating the commons can be implemented in Thai society when communities are ready. However, the state as a trustee for the public still needs to support CFM and to function where there is no CFM.

Nevertheless, state management of natural resources can also be problematic. Problems of legal implementation result from administrative structures that are too numerous and fragmented. Governmental agencies are ruled by statutes providing direct authority over natural resources, but this authority often overlaps with the authority of other agencies. For instance, in Thailand, watershed management overlaps with management of forest areas, which are both under the jurisdiction of the Ministry of Natural Resources and Environment. Within the ministry, there is a Department of Water Resources, and two departments governing forest area management – the RFD and DNWP.¹⁵⁰ In Thailand, the forestry laws grant powers to government agencies inside their areas of jurisdiction, with overlapping regulations from different agencies causing conflicts in practice. Moreover, the politics associated with government agencies distort their authority, and may sidetrack them from their missions. Society becomes disenfranchised within the scheme of governmental resource management. For instance, in Thailand, state agencies struggle with bureaucratic red tape, lack of funding, and political pressures, and these problems compromise their function as trustee for the public.¹⁵¹ When government agencies lose their function, a “checks and balances” system such as judicial review is supposed to be implemented. However, in the case of environmental issues, the judiciary loses its independence. Judicial reviews of environmental cases are often influenced by government agencies that provide complex of scientific and technical expertise, except in obvious corruption cases. The discretion of government agents tends to dominate the implementation of law.¹⁵² When the judicial branch does not comply with the law that is supposed to support the right to participate in community forest conservation, this becomes a key problem for CFM practitioners. In addition, the RFD’s new civil compensation scheme that involves charging villagers in global warming cases can result in having to present complicated technical data on topics such as the polluter pays principle and calculations from experts in forestry science.

¹⁵⁰ Watershed Conservation and Management Office, Department of National Parks, Wildlife and Plant Conservation (DNWP), online: DNWP <<http://www.dnp.go.th/watershed/>>.

¹⁵¹ Wood, *supra* note 75 at 57-58.

¹⁵² *Ibid.* at 60.

However, despite the malfunctions of the system that occur, society still needs a trustworthy system to secure natural resources for future generations and to incorporate the possibility of private ownership.¹⁵³ One recommendation of proponents of the public trust doctrine is to open the doctrine to the people and the commons where society is ready. Nature-based trusts depend on humans who protect their interests in ecological systems as being fundamental to the next generation. Thus, a new concept in this area is that the state and the people have to work together to take responsibility like trustees.¹⁵⁴ The concept of the ideal public trust doctrine suggests that Thai government officers do not always act like trustees, but as the owners of natural resources. This bureaucratic mindset leads to exclusion of the commons.

In terms of the state as a trustee, the legislative, executive and judicial branches are all accountable and all have obligations to actively protect the public trust. Legislators revise the regulations underpinning the public trust and common ownership. The executive branch is the natural agent of the legislature, acting as “trustee” in actual practice. The judicial branch applies all regulations concerning natural resources in an extensive system of law enforcement. The three branches of state power under the common law system can be applied in other legal systems and also at the international level.¹⁵⁵ This is one idea that remains to be put on trial in real life.

Feudalism, imperialism, and the public trust doctrine have all generated state authority over natural resources like forests. These ideas lead to top-down approaches to environmental and natural resource law, and hardly fulfill the goals of conservation. New hope lies in the public working together with government, because conservation cannot be achieved through state power alone. People power is needed as a crucial component of the cooperation that will be described next.

2.3.3 The Commons: Collective Rights and Collective Actions

While the state power concept focuses on actors from government agencies, this section will explore the concept of the commons, which focuses on the forest as a natural resource and on people power as a collective entity. This legal ideology directly supports CFM practice. I will

¹⁵³ *Ibid.* at 65.

¹⁵⁴ *Ibid.* at 71.

¹⁵⁵ *Ibid.* at 75-79, and 87.

explain the source of the bottom-up approach of the commons and its expansion into on-the-ground practice. Also, I will include discussion of some of the debates surrounding the commons that reveal how society functions with respect to natural resource management.

“The commons” refers to resources that are collectively owned by the people in a particular community.¹⁵⁶ Traditionally, the commons consisted of common land and natural resources such as rivers, wild animals, plants and forests.¹⁵⁷ Nowadays, it also includes cultural resources such as ideas, art, books and music that are in the public domain and that every person can therefore use, share, and reproduce.¹⁵⁸

According to economic theory, which explains how things and services are produced in society, people produce and sell goods and services and can make a profit by controlling who can access them. This is called the exclusion principle.¹⁵⁹ Another feature of goods and services is non-rivalry.¹⁶⁰ Non-rivalry indicates that the use of a product should not affect another person’s use.¹⁶¹ Examples of non-rival products are movies and music; everyone can consume these products without affecting other consumers. These types of goods or services are also called “toll goods”.

Table 2 Goods and Services Production¹⁶²

	Exclusion	Non-exclusion
Rival	Private goods: food, cars, clothes	Common goods (Common-pool resources): fish in the river/sea, trees in the forest, underground water
Non-rival	Toll goods or Club goods: parks, movies, music, telephone service, cable TV	Public goods: air quality, national defense, broadcasting, ecosystem

¹⁵⁶ David Bollier, “Reclaiming the Commons” (2002) *Boston Review: A Political and Literary Forum*, online: Boston Review <<http://bostonreview.net/BR27.3/bollier.html>>.

¹⁵⁷ C.A. Bowers, *Revitalizing the Commons: Cultural and Educational Sites of Resistance and Affirmation* (Lanham, MD: Lexington, 2006) at 2.

¹⁵⁸ David Berry, “The Commons” (2005) *Free Software Magazine*, online: Free Software Magazine <http://www.freesoftwaremagazine.com/articles/commons_as_ideas>.

¹⁵⁹ Cambell R. McConnell, Stanley L. Brue & William Henry Pope, *Economics: Principles, Problems, and Policies*, 5th ed. (Toronto: McGraw-Hill, 1990) at 196.

¹⁶⁰ Michael L. Katz & Harvey S. Rosen, *Microeconomics*, 2nd ed. (Burr Ridge, IL: Irwin, 1994) at 630.

¹⁶¹ See Andreu Mas-Colell, Michael Dennis Whinston & Jerry R. Green, *Microeconomic Theory* (Oxford: Oxford University Press, 1995).

¹⁶² Adapted from James T. Thomson & Karen Schoonmaker Freudenberger, *Crafting Institutional Arrangements for Community Forest* (Rome: Food and Agriculture Organization of the United Nations, 1997) online: Food and Agriculture Organization <<http://www.fao.org/docrep/w7483e/w7483e05.htm#forest%20resources%20and%20their%20outputs%20goods%20and%20services>>

In addition to private goods there are also public goods. Public goods are both non-exclusive and non-rival. Public goods are necessary for society, but contain the feature of non-rivalry, so that private people lack incentive to produce them. Thus, state has to provide these kinds of goods, such as national defense.¹⁶³ Public goods include good environmental “goods” such as clean air and ecosystems, as effort is required to provide and maintain the environment. There are always costs to providing products and services in society, and state providers manage these costs through, for example, levying taxes and fines.¹⁶⁴

The last type of goods and services is common-pool goods. When goods or services have the feature of non-exclusion, anyone can access them, and when many people consume them, they decline. Common-pool goods include natural resources such as fish and forests and are a subject of the commons.

Natural resources like forests provide two functions in society: forest ecosystems and biodiversity as public goods, and timber and non-timber products as common-pool resources. However, open access to natural resources is a problem that leads to over-exploitation. Therefore, communities need to manage natural resources for their benefit as both forest products and ecosystems.¹⁶⁵ This is the main goal of CFM, as will be shown in later chapters. Hence, the concept of the commons is a direct theoretical explanation of the operation of CFM in Thailand.

Inherent in the concept of the commons is the need to restrain the consumption of common-pool goods. For example, forests and wildlife are renewable resources, but when they have been consumed until the recovery rate cannot match the consumption rate, these resources will decline and degrade. In this kind of situation, natural resources can be considered to be common-pool goods.¹⁶⁶ However, whether the forest, plants, and wildlife are considered public goods or common-pool goods, they are all part of the commons that can be enjoyed in society.

Sometimes, when a community has broken down, the commons cannot function because there is no collective action and collective regulation in the community to manage

¹⁶³ Katz & Rosen, *supra* note 160 at 630.

¹⁶⁴ McConnell, Brue & Pope, *supra* note 159 at 195.

¹⁶⁵ Thomson & Freudenberger, *supra* note 162.

¹⁶⁶ Michael M’Gonigle, *et al.*, *When There’s a Way, There’s a Will – Report I: Developing Sustainability through the Community Ecosystem Trust* (Victoria: Eco-Research Chair of Environmental Law & Policy, 2001) at 15.

common resources. In such situations, over-exploitation of natural resources is a result. This is explained by the “tragedy of the commons”.¹⁶⁷ Without regulation of the commons, people can use public goods for free, and they tend to over-exploit them. Over-population combined with free access to the commons can ultimately devastate the commons. The commons has built-in consumption limitations. While forest areas function as ecosystems while also being used as public goods – as national parks or commons for people who live in the forest – they need regulation. However, Garrett Hardin points out that this kind of administrative regulation does not function very well; regulators also need to be monitored because of bureaucratic corruption. To provide common goods is still necessary but requires mutual coercion. Hardin uses the example of parking fines.¹⁶⁸ People can use parking spaces only for a limited time – after that, they have to pay fines.

The commons is separate from the state. The commons comes from the people and communities who manage their own natural resources. This concept applies to CFM in this study because CFM incorporates a process of screening and evaluation of communities that have the potential to manage and limit the use of the forest while preserving biodiversity. The idea is that the communities who originally lived in an area and who practise CFM must prove that they are sources of authority and legitimate stakeholders, and that they intend to be trustees of the forest for the public and the next generation. If communities fail to act as stewards, they will have to take responsibility to recover the forest. A monitoring system for the commons, by the commons, should therefore be established.¹⁶⁹

There are three approaches to defining public goods in society. The first approach is acceptance, which, in common-law countries, is determined by legal precedent.¹⁷⁰ When people use and treat a place as a commons for a certain period of time, it becomes a commons. The second approach is legislative definition of the commons.¹⁷¹ This approach begins with state power, which has the power to impose or revoke “commons” status. This approach is also connected with the public trust doctrine that is explained in the previous section. The last

¹⁶⁷ Garrett Hardin, “The Tragedy of the Commons” (1968) 162:3859 *Science*, New Series 1243.

¹⁶⁸ *Ibid.* at 1247.

¹⁶⁹ See M’Gonigle, *et al.*, *supra* note 166.

¹⁷⁰ Carol Rose, “The Comedy of the Commons: Customs, Commerce, and Inherently Public Property” (1986) 53 *University of Chicago Law Review* 711 at 732.

¹⁷¹ *Ibid.* at 735.

approach, based on customary law, is called prescriptive right,¹⁷² and refers to the right of members of community to use the land, for example, to graze animals or collect wood.¹⁷³ All of these three approaches show that, in fact, the commons is organized in various ways.¹⁷⁴

For example, in order to manage the commons, resources are reserved for the use of community members. In turn, community members have to maintain the resources by using them sustainably. This means that community members, as stewards of the common-pool resources which contain open access features, have to exclude outsiders from using them.¹⁷⁵ An example of this is a fishery that allows only local fishermen to continue fishing in an area. The way is to regulate use of the commons. For example, those local fishermen may have access to a fishery, but may be limited to only using certain methods, such as fly-casting, rather than trawling or gillnetting. To apply management of the commons to this study, only traditional communities that lived in forest areas before they became national parks can practise CFM; and these people's activities are limited in that they can collect non-timber products from the forest but can only use timber for household consumption and have to re-plant trees after taking the timber.

Activities of people who use the commons are normally viewed as collective actions.¹⁷⁶ Problem behaviours of people who use the commons are "free-riding" and over-exploitation. People always tend to maximize their self-interest in the commons while expecting others to make contributions to sustain the commons.¹⁷⁷ Therefore, society needs the collective actions of communities to manage the commons. When users cannot be excluded from using, there is incentive to make an effort to contribute to the commons.¹⁷⁸ An important tool for managing

¹⁷² "Prescription" means the method of acquiring an easement upon another's real property such as land by persistent and normal use without permission of the property owner for period of time required by law (10 years under Thai law). See online: The Free Dictionary <<http://legal-dictionary.thefreedictionary.com/prescription>>.

¹⁷³ *Ibid.* at 739-743.

¹⁷⁴ Carol Rose, "Rethinking Environmental Controls: Management Strategies for Common Resources" (1991) 1 *Duke Law Journal* 1 at 9.

¹⁷⁵ Thomson & Freudenberger, *supra* note 162: "Chapter 5: The Characteristics of the Rules and Resource Management Incentives".

¹⁷⁶ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (New York: Cambridge University Press, 1995) at 5.

¹⁷⁷ C. Ford Runge, "Common Property and Collective Action in Economic Development" in Daniel W. Bromley, ed., *Making The Commons Work* (San Francisco: International Center for Self-Governance, 1992) 17 at 21.

¹⁷⁸ Ostrom, *supra* note 176 at 6.

free-riders is information.¹⁷⁹ Because people in a community can observe each other, it is a simple matter that people do not pay when they see that no one else is paying. However, even though the majority do not make contributions to the commons, there will still usually be a small number of community members who make an effort and keep the commons at the optimum level of benefit.¹⁸⁰

Managing the commons cannot be achieved by using only one method; in fact, several methods must be used together, which can be adjusted to suit each community.¹⁸¹ Some features of common-pool resources cannot be divided; also if society privatizes the commons, including forest areas, these can be divided into individually owned lands. However, private ownership cannot resolve existing environmental problems because private property usage and transfer also requires regulation to preserve natural resources and because there is no guarantee that biodiversity and the ecosystem will be protected.

Those who manage the commons normally form collective units such as local people's associations or environmental groups. Communities can act collectively and be held collectively responsible for the management of common goods. Collective rights sound promising to the poor, and can potentially help them to stand up in society and compete with corporations and government. People in the north of Thailand or in rural areas seem to practise more collective rights, as demonstrated by the construction of traditional irrigation systems, community temples, and the creation of community land for communal village use.¹⁸² These actions illustrate the rights of the community and their legitimacy to possess and manage common goods.

Interdependence and collective action could be a solution to managing the commons.¹⁸³ A community could establish an organization by members coming together voluntarily. Members could make their commitments in contract-like form and use monitoring agents. If someone in the group cannot perform according to the contract, that person will be excluded from the group and the use of the commons.

¹⁷⁹ *Ibid.* at 44.

¹⁸⁰ *Ibid.* at 6.

¹⁸¹ *Ibid.* at 8-10.

¹⁸² Anan Ganjanapan, *Community Dimension: Local Epistemology on Rights, Power, and Natural Resource Management* (in Thai) (Bangkok: Thailand Research Fund, 2001).

¹⁸³ Ostrom, *supra* note 176 at 40.

A problem with collective action that may erupt is with long-term commitment.¹⁸⁴ Sometimes, external controls and monitoring can help resolve this problem, but there is no rational motivation for the external to come and monitor the community. Rather, the community itself needs to have self-monitoring and to control their own contracts, which is more efficient. This is practised in many communities. For example, the existing community forest trust provides several models from small communities that conduct themselves as stewards of natural resources.¹⁸⁵

There are three types of community-based management that function as collective units to manage the commons.¹⁸⁶ These collective units include various people's groups, such as the administrative units in India that local governments use for joint forest management.¹⁸⁷ Another example is a type of ecological boundary unit that can oversee a large forest area that is located in more than one local administrative unit – such as the Lomerio Project, which is managed by an indigenous community in Bolivia.¹⁸⁸ The last type of collective unit is formed according to patterns of use, such as those of a group of forest users in Nepal.¹⁸⁹

Finally, the last type of community that manages the commons is based on ecosystem-based management.¹⁹⁰ This approach is focused on maintaining “ecological integrity” and assumes that individuals come together as collective actors and make their commitment to managing the commons.¹⁹¹ This form of management attempts to sustain usage of the commons and maintain the ecosystem at the same time. For example, proponents will consider animal and plant biodiversity as well as sustainable human lifestyles that include recycling and energy and water conservation. This study follows communities with ecosystem-based CFM, to illustrate how CFM in Thailand can sustain biodiversity in forest areas.

¹⁸⁴ *Ibid.* at 43.

¹⁸⁵ M'Gonigle, *et al.*, *supra* note 166 at 8.

¹⁸⁶ *Ibid.*

¹⁸⁷ Brian Egan, *et al.*, *When There's a Way, There's a Will – Report II: Model of Community-Based Natural Resource Management* (Victoria: Eco-Research Chair of Environmental Law & Policy, 2001) at 6.

¹⁸⁸ *Ibid.* at 19.

¹⁸⁹ *Ibid.* at 4.

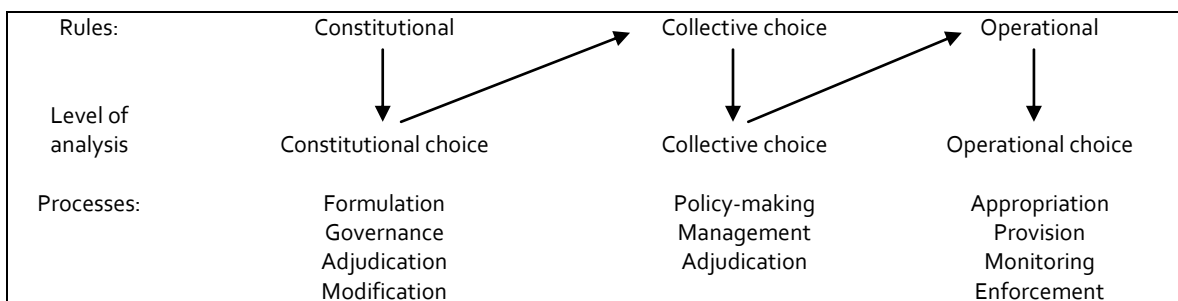
¹⁹⁰ M'Gonigle, *et al.*, *supra* note 166 at 13.

¹⁹¹ Michael M'Gonigle, “Living Communities in a Living Forest: Towards an Ecosystem-Based Structure of Local Tenure and Management” in Chris Tollefson, ed., *The Wealth of Forests: Markets, Regulation, and Sustainable Forestry* (Vancouver: UBC Press, 1998) 102.

Another theory that tries to defend people’s role in common goods management is people’s participation. The right of indigenous peoples to self-determination is recognized by international convention as well as international environmental law. Therefore, it is important to integrate these two principles together: the rights and responsibilities to manage and use the land, and the commons that is located within indigenous ancestral domains.¹⁹² This approach requires cooperation between the users of the commons and the state under the public trust doctrine. This theory accepts the necessity of state power and focuses on cooperation between the state and the people. People have the right to participate in natural resource management for their own benefit and so that they can create more efficient management systems. This might discriminate against people who do not practise CFM, but it will be an incentive for the communities who rely on the forest to become forest stewards rather than forest destroyers. Meanwhile, the rights of the people are important – not only the rights that government policies “grant” to the people. However, the use of rights also has a limit. Under constitutional law, people can exercise their rights as long as they do not violate other people’s rights or the public interest. Thus, while a community who lives in a forest area may have the right to live there, members still have a responsibility to protect the forest, as it is part of the commons, and should be preserved for public use.

In the next section, I will use multiple levels of analysis from Elinor Ostrom’s *Governing the Commons*¹⁹³ to explain patterns of interaction of the commons with other institutions in society. Actions in relation to the commons operate by using common-pool resources and by establishing rules to govern the commons. All rules connect together as shown in Figure 2.

Figure 2 Linkages among rules and levels of analysis¹⁹⁴



¹⁹² Egan, *et al.*, *supra* note 187 at 70.

¹⁹³ Ostrom, *supra* note 176 at 50.

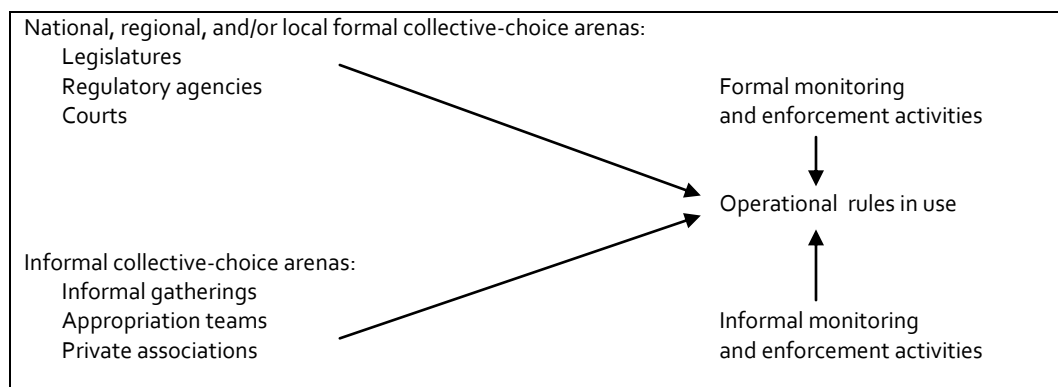
¹⁹⁴ *Ibid.* at 53.

The rules consist of three levels: operational choice, collective choice, and constitutional choice. Operational choice rules are created within a set of collective choice rules, which are formed within a set of constitutional choice rules.¹⁹⁵ While the operational choice rules are working, technology and institutional rules adjust and develop over time. The operational rules are used in everyday management and are easier to adapt and adjust when compared to the higher levels of rules.

This linkage explains community CFM rules; communities start from their constitutional and cultural rights to manage their natural resources. First, community members begin by creating constitutional rules to govern their CFM by community consensus, and by establishing a community forest committee. Second, they set up principles of forest conservation and use, such as rules that community members can collect non-timber products from the forest but can only use timber for house construction after receiving permission from the CFM committee. Third, the CFM committee sets up a process for timber usage applications and imposes fines on violators.

A community forms sets of working rules for managing the commons about what to do, how and who can do it. At the same time, formal law is enforced via general rules, such as legislation, administrative regulations and court decisions, and is also a crucial source of working rules.¹⁹⁶ These rules are nested because there are several levels of rules that affect each other. Interaction among different types of rules is shown in Figure 3.

Figure 3 Relationship of formal and informal collective-choice arenas to operation rules¹⁹⁷



¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.* at 51.

¹⁹⁷ *Ibid.* at 53.

This figure explicates the multi-level functions of Thai CFM regulations, which will be discussed in Chapters 4 and 5. In formal collective-choice arenas, local communities use participation as part of forest conservation, while they also use state forestry legislation, which they apply to violators who repeatedly ignore the CFM regulations. In some communities, local administrative organizations endorse CFM regulations in local legislatures. The communities' formal monitoring systems start with their CFM committees while, at the national level, the communities cooperate with the RFD or DNWP.

In informal collective-choice arenas, the communities that practise CFM normally have social boundaries between generations. Political and spiritual leaders are informal regulators and monitors. NGOs, government development projects and international assistance organizations regarding human rights and environmental issues are also part of these informal arenas.

Chusak Wittayapak has used Ostrom's models with four selected communities in northern Thailand who manage watershed areas.¹⁹⁸ Wittayapak's study shows that the villagers' awareness of their community regulations, and how they were established, are factors that shape how these communities manage in their watershed areas. Wittayapak's work is relevant to my study in terms of natural resource management in general because watershed areas are classified as forest areas and are both overseen by the Ministry of Natural Resources and Environment. Wittayapak's study deeply examines how the selected communities conduct their operational rules and create institutional characteristics for common property resources.¹⁹⁹

In brief, I have used economic theory to explain the features of the commons and how the commons manages natural resources. This concept illustrates how the physical features of nature interrelate with social worlds based upon the characteristics of ecological political economics.²⁰⁰ In this section, I focused on the commons, which is a territorial form of social

¹⁹⁸ Chusak Wittayapak, *Local Institutions in Common Property Resources: A Case Study of Community-Based Watershed Management in Northern Thailand* (Ph.D. Dissertation, Department of Geography, University of Victoria, 1994) [unpublished].

¹⁹⁹ Wittayapak uses seven design principles to characterize community institutions: clearly defined boundaries; congruence between appropriation and provision rules and local conditions; collective-choice arrangements; monitoring; graduated sanctions; conflict resolution mechanisms; and minimal intervention in rights to organize.

²⁰⁰ Michael M'Gonigle, "A Dialectic of Centre and Territory: The Political Economy of Ecological Flows and Spatial Relations" in Fred P. Gale & Michael M'Gonigle, eds., *Nature, Production, Power: Towards an Ecological Political Economy* (Cheltenham, UK: Edward Elgar, 2000) 3 at 4.

organization that promotes sustainable use of local resources.²⁰¹ At the same time, the central hierarchical organization of state power can provide support in the form of non-local resources via the public trust doctrine. These parallel structures of local territory and state centre may be in a state of conflict, or cooperation. To illustrate the relationship between the commons and state law, I will show how the CFM of select Thai communities interacts with Thai state law.

Overall, GLT respects the basic principle of community management of the commons. Because communities and local people rely on the commons, they know from their experiences in the field how best to manage the commons based on their environmental consciousness. Several commons management methods should be applied to compensate for the flaws in each method, so that communities can benefit from integration of the strongest management features. Functional environmental monitoring by local users will also ensure the ecosystem will be sustained so that the commons can be used by future generations. The concept of combining many environmental management approaches together in a legal system is a form of legal pluralism, which will be explained in the next part.

2.3.4 Legal Pluralism: Alternative Approach

Green Legal Theory (GLT) comments on the state's monopoly over environmental and natural resource management and believes in an alternative way of environmental management, such as that suggested by legal pluralism. The concept of legal pluralism explains the living law that actually operates in Thai CFM, while the formal legal system refuses to officially recognize it. My claim is that if the Thai legal system were to apply the concept of legal pluralism, this would help resolve the problems with CFM enforcement.

Thailand before Siam had a pluralistic legal system, but after King Rama V united the country, the legal system also became united. The legal culture of positivism, including legal education, has eradicated much of folk law. Today, Thai lawyers do not know how to apply legal pluralism. However, when the government accepts the practice of CFM in some communities, they can be considered as applying legal pluralism.

Legal pluralism helps in understanding the practices of people in the physical world and can be a mechanism for reconstructing legal systems in order to reduce environmental crises related to natural resource management. Legal pluralism also connects to the neo-naturalist concepts of being-in-relation, valuing others' beliefs, and diversity, and to the alternative

²⁰¹ *Ibid.*

solutions that green legal theory proposes to resolve the weaknesses of law concerning environmental issues and natural resources. The philosophy of legal pluralism creates a legal system that aims to protect the environment and sustainably manage natural resources. Legal pluralism will hopefully help to create receptivity to CFM practice in Thai legal culture.

The theory of legal pluralism stemmed from discourses on legal systems of indigenous peoples in Africa who applied their law along with the state law, which was based on capitalism.²⁰² At that time, legal pluralism meant “a situation in which two or more legal systems coexist in the same social field.”²⁰³ A legally pluralistic society is one that has a dominant system of law, and within the same legal order there are subgroups that apply their own rules differently from those of the dominant law.

During the first period of legal pluralism,²⁰⁴ the laws and procedures of indigenous or other subgroups were recognized and distinguished from normative law; later, legal pluralism expanded its concerns and looked at diversity in the legal system, whether applied to courts and judges, or included in a broad sense as any action that supported implementation of mixed state law and non-state law systems.²⁰⁵ An example of the first type of legal pluralism is the kind of dual legal system that developed in the colonies of European countries, in which colonies were allowed to apply the local law to the local people in some areas of law, especially in the private sphere, such as family law.²⁰⁶ In this type of pluralistic legal order, the colonizer’s law became the state law, but some elements of the local practice were also accepted. In the environmental context, this is similar to a situation in which the national environmental law is the state law, and the indigenous peoples’ practices of forest management are the local laws. The theory of legal pluralism can explain the interrelationship between these two sets of laws. This interrelationship exists in the practice of CFM implementation when CFM regulations are incorporated into state forestry law enforcement. I use legal pluralism to suggest that the Thai legal system should accept CFM regulations, which are based on the commons model of natural

²⁰² Sally Engle Merry, “Legal Pluralism” (1988) 22 *Law & Society Review* 869 at 869.

²⁰³ *Ibid.* at 2.

²⁰⁴ This concept is called “classical legal pluralism” and the scholars in this area include John Griffiths and M.B. Hooker.

²⁰⁵ Merry, *supra* note 202 at 870.

²⁰⁶ John Griffiths, “What is Legal Pluralism” (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1 at 5.

resource management, because currently Thai legal culture does not enforce CFM regulations.²⁰⁷

Another dimension of classical legal pluralism is that the law of the colonizers transferred European legal systems across cultural boundaries to their colonies.²⁰⁸ After independence, post-colonial legal systems were frustrated and became obstructive to progress. This was because the newly independent countries needed united laws while, at the same time, they experienced resistance from the subgroups that wanted to maintain their own rule. To apply this concept to environmental law, the United States and international models of environmental legal instruments have a great deal of influence over domestic environmental law; many countries transfer these models and apply them in their nations as if they were adopting colonial laws. At the same time, some subgroups in society will still have cultural beliefs with which the adopted laws are incompatible. Therefore, societies that adopt foreign legal models may not be able to enforce environmental laws efficiently. As I described earlier in the section on state power, Thai law has already incorporated the colonial laws of Siam, as well as incorporating other laws arising from international treaties. This shows that the Thai legal system has already unconsciously employed legal pluralism.

In the new era of legal pluralism, scholarly interest has expanded to the relationship between dominant and subordinate groups – for example, spiritual, tribal, cultural or immigrant groups – and unofficial forms of ordering in social networks and associations.²⁰⁹ This expanded scope of enquiry is called the “new legal pluralism” and can emerge in varying degrees in society. The problem with this new legal pluralism is the issue of how to define or identify non-state law. The concept is still fluid and flexible. It can also be applied to environmental concerns, such as situations in which environmentalists create rules for their own subgroups about how to preserve the trees in a certain area. These practices can lead to more complexity in a national park, for example, which is governed by state law and which may also have indigenous communities living there who have their own rules about managing the forest. This causes difficulty for environmental groups who come into these communities and also claim their rights to protect the forest. In actuality, living law in Thailand concerning CFM has

²⁰⁷ See further discussion in Chapter 6, section 6.2.2.

²⁰⁸ M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon, 1975) at 1.

²⁰⁹ Merry, *supra* note 202 at 871.

already applied legal pluralism, but this has only received informal recognition by legal professionals.

The important questions for legal pluralism are concerned with very complicated applications and interactions between state law and non-state law. For instance, when subgroup members apply their own rules to a particular incident, how can they be allowed to choose between having the state law apply, or having the subgroup's law apply? Similarly, how can we know what the subgroup's rules are, especially if the subgroup is part of an oral culture?²¹⁰ Legal pluralists are still searching for the answers to these questions in field research. Lawrence Friedman, Brian Tamanaha, and Boaventura de Sousa Santos all attempt to provide clarity about these issues.

Friedman describes the complexity of legal pluralism by dividing legal structures into two categories: horizontal and vertical.²¹¹ Horizontal pluralism describes legal structures that have equal status in subcultures or subsystems, such as when legal cultural aspects of religious law cooperate with state law. Examples of this are the Islamic courts within the state civil court system in Indonesia, and the application of Islamic family law in the four southern provinces of Thailand. Also, legal structures in federal states can be classified as legally pluralistic when the laws of each state within a federation are equal in status to the laws of every other state, as within in the United States. The next form of legal pluralism that Friedman mentions is vertical pluralism, which describes a legal structure that is hierarchical. Examples include the law in colonial legal systems, and the laws in federal states that dictate that national laws supercede local government laws when there are conflicts.²¹² The Thai legal system is hierarchical in that national statutory law is considered to have more weight than administrative laws like royal decrees. Vertical legal pluralism has already been formally applied in the Thai legal system, so it would be easy to expand CFM on the horizontal level of law enforcement.

To accurately portray the complexity of law in society using Tamanaha's function-based definition of law,²¹³ one must see law as a concrete pattern of behaviour within a social group, and as the outcome of institutionalized norm enforcement. Most theorists prefer to use the

²¹⁰ Griffiths, *supra* note 206 at 7.

²¹¹ Friedman, *supra* note 39 at 196.

²¹² *Ibid.*

²¹³ Brian Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27 *Journal of Law & Society* 296 at 300.

second way to define law because it is more obvious.²¹⁴ For instance, de Sousa Santos uses the functional approach to define law by categorizing it into “six structural clusters of social relations in capitalist societies integrating the world system”.²¹⁵ According to him, there are six groups of laws: domestic law, production law, exchange law, community law, territorial or state law, and systemic law. These laws are organized and have hierarchy. These labels help to enforce the law; when we can find the label, then we can apply it according to the pattern. However, law in real life is difficult to put in boxes; for example, following community recycling rules can be seen as carrying out household practices or as enacting community laws. The positive effect of attempting this kind of categorization is to draw a picture of the fascinating layers of law in society. This explanation of how to manage legal pluralism can be introduced to the Thai legal system, and also to CFM implementation to see the cooperation between state law and the law of the commons – CFM regulation.

2.3.5 Indigenous Legal Studies: Alternative Perspective

In addition to legal pluralism, GLT proposes indigenous critical legal theory as providing alternative solutions to systemic environmental law problems. As CFM in Thailand was developed in part by indigenous peoples, and as many indigenous communities practise CFM in Thailand, indigenous critical legal theory can be used into two ways: as a research tool, and to propose solutions to research problems.

Indigenous critical legal methodology is also a research tool that helps researchers to see things differently. Because the law and culture in colonized societies is based on imperialism, the knowledge that society members are taught is influenced by the dominant society.²¹⁶ Therefore, researchers have to listen and take indigenous people’s points of view into account in order to see legal problems holistically.

Self-determination is a fundamental concept that is embedded in indigenous critical legal theory, and highlights the rights of people to resist state power. Villagers have the right to self-determination. To remove them from their lands is against their rights. Indigenous people’s participation might be a solution to maintaining both biodiversity and the rights of the people.

²¹⁴ *Ibid.* at 301.

²¹⁵ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalisation and Emancipation*, 2d ed. (London: Butterworths, 2002) at 429.

²¹⁶ See Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous People* (London: Zed, 1999).

On the other hand, the law has to consider the rights of people to live in healthy environments, as well as the rights of the next generation. The task of the law is to keep humans and nature in balance. CFM tradition shows how living law in Thailand applies indigenous legal concepts.

A major focus of indigenous critical legal theory is indigenous people's source of legitimacy and power to take part in natural resource management and the parallel concepts in relation to state power. Indigenous critical legal theory supports CFM, which is often practised by indigenous peoples who live in the forest. Government policies affect people's livelihoods and their rights. CFM is one of the ways for indigenous people to retain traditional subsistence livelihoods. A study of CFM cannot avoid indigenous issues and needs to consider indigenous perspectives. The legitimacy and power of indigenous law as a fundamental principle supports indigenous communities' rights to practise CFM and establish their regulations regarding the sustainable use and conservation of natural resources.

Indigenous communities' concepts of law are rooted in the natural world and in that way are also related to naturalism, since in both views it is the rule of nature that must be followed. Other concepts from naturalism also apply to indigenous legal issues, including taking collective action to achieve justice and equality even when state law does not recognize indigenous rights.²¹⁷ Thai forestry law has typically viewed natural resources as Crown property, and has ignored the local knowledge of indigenous peoples. This is the case even though the *Constitution* guarantees the rights of the community to participate in forest conservation. Unfortunately, the practice of listening to indigenous voices is still far from the mind-set of the Thai legal system. Therefore, the implementation of indigenous concepts is still required in the social movement to overcome this struggle.

One strategy for applying indigenous legal concepts to state law is to listen and spend time in the forest.²¹⁸ The process of applying indigenous knowledge and supporting indigenous communities to protect their rights requires an approach from the ground up. We have to listen carefully to indigenous messages, because they might not be in written form. This process is called "cultural sensitivity".²¹⁹ When indigenous knowledge is presented in the state legal system, such as in the courtroom, judges should also go through the same process – to listen

²¹⁷ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 30-31.

²¹⁸ Robert A. Williams, "Vampires Anonymous and Critical Race Practice" (1997) 95 *Michigan Law Review* 741 at 761-762.

²¹⁹ *Ibid.* at 764.

and interpret with cultural sensitivity – and then indigenous law can be applied in the state law arena.

In part 2.3, I illustrated green legal theory and discussed five ideologies that green legal theory uses to analyze law concerning environmental issues. My study applies these five concepts to CFM as a fundamental source of legal authority: 1) the new naturalism, which reconsiders the law concerning CFM; 2) state power, which governs natural resources such as forests; 3) the commons, which reflects how resources are managed by communities; 4) legal pluralism; and 5) indigenous critical legal theory. These last two provide ideas about how to govern the commons without relying on state power, or how to modify state power so that it respects people's self-determination and supports the practice of CFM. In the next section, I will present concepts that explain legal phenomena that actually occur in society once legal systems and social structures enforce CFM.

2.4 Social Change and Living Law

In field research for this study, I used legal consciousness and legal culture as research tools and green legal theory as an analytical ideology. The final legal concept I will discuss that explains legal phenomena found in this study is the "living law" concept. In investigating this concept, I will outline the following aspects of law and social change that dominate living law in Thai legal culture concerning CFM: legal and social change, legal transplants, history, time and space, and folk law. This analysis will help to elucidate how living law is constructed in the Thai legal system.

Living law is an understanding of law that is applied by socio-legal scholars to people's everyday lives. Due to problems of law enforcement, scholars try to discover how people use the law. Sometimes, law in action seems to be different from law in the books or state law. Law in society is real and its function is explained by the theory of living law. The concept of living law comes from Eugen Ehrlich, one of the early scholars of the sociology of law. The sociology of law seeks to provide a comprehensive understanding of law in society by focusing on how law develops its propositions, sources, doctrines and institutions through history and ethnology.²²⁰ This kind of study requires an ability to interpret the phenomena of legal actions

²²⁰ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll (New York: Russell & Russell, 1962) at 474.

and documents in order to “read between the lines of the traditional material.”²²¹ I apply this method in the first part of Chapter 5, where I investigate the history and social contexts that shaped Thai legal culture.

Ehrlich emphasizes the viewpoint of the historical school that legal studies should illustrate how law is constituted from its surrounding political, social, and economic contexts. Hence, to study the law, researchers have to ensure they examine the circumstances of law. For example, to study community forest management, I need to gain an in-depth understanding of the environment and community through learning about the history and everyday lives of community members.

Methods of living law include investigation of legislation and legal practices such as the rendering of court decisions.²²² Traditional normative legal studies focus on civil, criminal and procedural code laws and their interpretation while leaving aside more dynamic forms of law such as commercial law and labour law.²²³ However, socio-legal scholars consider these other forms of law because law is often created outside of statutory law. In this study, I would like to consider environmental law principles and indigenous critical legal theory, which are left behind by traditional legal studies. The theory of living law suggests the importance of observing day-to-day legal events, such as how people file their legal documents and how jurists conduct their cases; living law looks at how people actually behave and how they apply the law in their lives.²²⁴ Living law proponents are also interested in “passive actions” such as not using a particular law because it is disapproved of or ignored.²²⁵ This explains the actions of Thai judges who ignore constitutional rights in CFM cases. Most of all, the living law method involves finding out about ordinary people in actual legal situations.²²⁶ I use this method to explain the results of my field interviews that suggest that ordinary people use their own CFM regulations, while also using state forestry law as a secondary source of law.

This study finds the epiphenomenon of Thai legal culture as living law in Thai society. Living law is a result of social incidents; sometimes, internal legal culture is affected by legal

²²¹ *Ibid.* at 475.

²²² *Ibid.* at 486.

²²³ *Ibid.* at 488.

²²⁴ *Ibid.* at 489.

²²⁵ *Ibid.* at 493.

²²⁶ *Ibid.* at 497.

transplantation and then legal transplants spread to external legal culture and affects ordinary people. At the same time, legal culture is, in fact, living law in each society, because legal culture is not static but dynamic. Legal actions and their impacts on law enforcement influence people's relationships in everyday life. When individuals or groups put forward their interests and demands, these legal acts are the result of social forces that may lead to conflict and bargaining.

The response of law to social change can either expand or reduce the gap between state law and living law that occurs in Thai society. To understand more about law and social change, Friedman divides social change and legal change into four types by using a cause and effect approach he calls "the point of origin" and the "final point of impact".²²⁷

The first type of change starts within the legal system and only impacts the legal system. This happens when there is a minor technical change in professional procedure that does not have any external impact on society. An example of this first type is a minor change in the wording of legislation, such as substituting "and" for "or".²²⁸ For example, originally, section 3 of the Thai *Constitution of 1997* stated, "The sovereign power 'belongs' to the Thai people". After many years of scholarly debate, the words "belongs to" were changed to "is derived from" to reflect the concept of direct democracy.²²⁹ Another example of this kind of change is reform of the law and regulations in order to codify or systematize various laws. In Thailand, this applies to the reorganization of the RFD and DNWP; creation of a land code to standardize land management; and uniting the courts during the reign of King Rama V. This type of change is often made for political reasons; for example, the creation of the Napoleonic Code was aimed at reducing the power of the judiciary.²³⁰ The courts were consolidated at this time because Siam wanted to revoke the extraterritorial jurisdiction of the Siamese court. Another example of this kind of change in Thai society was the drafting of the *Community Forest Bill*, which resulted from political pressure from forest dwellers and NGOs. However, I believe that even a small change in the legal profession still somehow has an effect on society. Such effects may

²²⁷ Friedman, *supra* note 39 at 269.

²²⁸ *Ibid.* at 270.

²²⁹ See Pokhin Pollakul, *Problems, Concepts, and Ideas in Thai Constitutional Law* (in Thai) (Bangkok: Ponlachai, 1986).

²³⁰ Friedman, *supra* note 39 at 271.

only be indirect, but could impact everything from legal procedures and conducting lawsuits to the performance of the judiciary and how people deal with the results of adjudication.

The second pattern of change begins from outside the legal system but affects only the legal system.²³¹ This kind of legal change is technical, with no effect on outside society and mostly comes from trying to balance the diverging interests of two or more groups. Therefore, the result in the legal system is minimal and creates “toothless” legal change. For example, this may occur when one women’s group tries to legalize prostitution and another opposes it; both pro and con arguments put similar pressure on the legislature. Similarly, supporters and opponents of the *Community Forest Bill* had similar degrees of political power, resulting in the law having to compromise to accommodate both sides. In the end there was zero change – the bill did not pass – and everyone continued to use the state forestry law.

The third type of change happens from inside the legal system and affects the outside society.²³² This results from formal changes to the law, including legislation and court decisions, and then “accidentally” affects society more than is expected. Examples of this type of legal change are often a result of jurisprudence. For example, the *Priestley v. Fowler* case, which was decided in England in 1837, had an unexpectedly large impact in the United Kingdom and the United States on the industrial situation at that time.²³³

The fourth type of change is the type that originates in society and then moves through the legal system and has an effect on society outside the legal system. Normally, this type of change has major consequences. Revolutionary change in society can be created through law. For example, in Thailand, the “people’s constitution” of 1997 was created when Thai citizens demanded political reform and a constitution legitimated by the people, not by a coup.

Social demands drive legal change, mainly through legislation and occasionally through court decisions. This is an example of law as deliberate social engineering. For example, the New Deal was established by a group of laws in England, and the end of racial segregation in the United States followed the *Brown v. Board of Education* case.²³⁴ In terms of Thai CFM, forestry law and environmental law have changed how society preserves the forest, with the *Constitution of 1997* creating another wave of community participation in forest conservation.

²³¹ *Ibid.* at 275.

²³² *Ibid.* at 274.

²³³ *Ibid.* at 275.

²³⁴ *Ibid.* at 276-277.

In the Thai global warming case, the judges allowed the RFD to file for civil compensation and this also shaped Thai forest conservation, providing another legal tool to prevent forest trespassing.²³⁵

However, changes through legislation can be weakened by judges taking a passive stance on law enforcement.²³⁶ For instance, the drafters of the Thai *Constitution of 1997* tried to provide for the protection of community forest management rights but lawyers and judges simply ignored these constitutional rights; therefore the *Constitution* has not been applied.²³⁷

An example of Thai legal change that has caused social change that is directly related to this study is the law reform that resulted in the enactment of the *Land Code*, which classifies unoccupied lands as public or Crown land.²³⁸ This has had a huge impact on law enforcement and has shaped land use in Thai society.

This last pattern fits perfectly with the study of the Thai environmental movement and CFM. Social change happens as a result of environmental crises like deforestation, which mobilize changes in the legal system, such as enacting laws to protect the ecosystem, and these changes in turn affect people's behaviour and increase their level of concern about the environment. In addition, this phenomenon is dynamic because it is constantly in motion – increasing populations, creating new technologies, and changing cultures. The interaction between changes in law and society is continual, creating living law. Moreover, these legal changes and social effects will be reflected in the legal consciousness of members of the legal profession.

Society has been changed by many factors, such as new technological and social inventions, and this has caused people to change their values and ideologies as well as their behaviour.²³⁹ In some societies, change occurs faster than in others. For example, societies with highly developed technologies tend to value competitive behaviour.

Hence, change can begin from within the legal system or within society and can then affect others. There are three mechanisms in legal systems that react to social change: making

²³⁵ For more details, see discussion in sections 5.2.2 and 6.2.2.5.

²³⁶ Friedman, *supra* note 39 at 278.

²³⁷ For more details, see section 4.2.6.

²³⁸ *Land Code*, Royal Thai Government Gazette 71:78 (30 November 1954), s.2.

²³⁹ Yehezkel Dror, "Law and Social Change" in Rita James Simon, ed., *The Sociology of Law: Interdisciplinary Readings* (Chicago: Chandler, 1968) 663 at 665.

law; applying law; and enforcing law.²⁴⁰ However, in Thai legal culture, especially regarding constitutional rights, legislation alone is not enough to change legal culture. At the same time, even if the *Community Forest Bill* had been enacted, it would have been applied according to the statute-based legal culture in Thailand, and would not have resolved the problem of direct constitutional implementation.

Patterns of social change described above can be applied in legislative, administrative, and judicial organizations. When the legislature has limited power to change the law, then social change may come from judicial interpretation. As well, administrative organizations can change the law through secondary legislation.²⁴¹ However, when these three mechanisms fail to adapt to social change, the gap between the law in books and the law in action becomes larger and people will need to mobilize to change the law. In general, these processes can transform social demands into legal change.

On the other hand, the law can change society to some extent. Such change can come from legal transplantation, especially in the globalized information society. A simple example is intellectual property (IP) law. Countries such as the United States and European Union member states that produce IP products have forced almost every country to adopt IP laws and effectively enforce them. Despite some violations of the law, so far IP law has changed society so that it accepts this new legal ideology.

Making legal change through court decisions is called “creative disruption of the judicial form” and can make revolutionary change in law and society.²⁴² This kind of change needs three groups of actors: legal professionals, activist judges, and elites. Legal professionals can educate each other about the importance of social issues. For example, long before *Brown v. Board of Education*, the anti-racial discrimination movement established education for black law students and supported black lawyers in the legal system. In Thailand, the Constitutional Court decision on the *Name Title Act* created revolutionary change in the Thai legal system as I will explain in Chapter 6. Proponents of CFM need to create this kind of revolution; however, based on the negative outcomes of cases involving local or community rights, it would seem

²⁴⁰ *Ibid.* at 667.

²⁴¹ *Ibid.* at 668.

²⁴² Friedman, *supra* note 39 at 278.

that Thai legal culture will make this kind of change difficult to achieve.²⁴³ Legal education is needed to pave the way for more acceptance of CFM and regulation of the commons.

The second group of actors who can create revolutionary change is judges. Activist judges may not always be liberal judges. Passive judges can either make change or weaken the possibility of the law creating social change. A small number of liberal activist judges is enough to make history through judicial review. The last and most important group of actors is elites, who are wealthy and educated and have power in society. These three groups facilitate legal and social change through the judicial arena. There are two vehicles that can establish legal and social change regarding CFM: lawyers' associations and law schools, because they have the potential to create liberal activist lawyers and liberal activist judges. However, elites may still need to be educated about the fact that CFM is also in their interest.

Each legal change has a unique history. It begins with social demands that put pressure on the legal system to change the rules. However, legal institutions have flexibility and limitations which depend on law, custom, and public opinion. In transition periods of legal change, legal professionals try to create new rules that might be objective or discretionary. However, legal custom tends to reduce uncertainty in the legal system. Thus, the law moves toward objectivity rather than discretion.²⁴⁴ In terms of CFM, one reason for this is that government officers and lawyers want to have clear regulatory guidelines. Another reason is that the culture of the Thai legal system is based on positivism.

In terms of favouring either objectivity or discretion, different actors in the legal system may have their own preferences. To illustrate, rule-makers move the system of rules toward objectivity and quantitative forms of law, while judges use their discretion to develop complicated rules based on court decisions. In contrast, law enforcers such as government officers do not like binding rules but sometimes like objective law because it is simple to follow. Hence, living law struggles toward acceptable compromises between state law and folk law.

Legal change sometimes comes from legal adaptation: states may receive influences from foreign legal systems or legal concepts either by force or voluntarily. International movement also plays a role in legal adaptation, also known as "legal transplantation".²⁴⁵ The meaning of the phrase "legal transplant" comes from the word "transplant" which means "to

²⁴³ For more details, see section 6.2.2.5.

²⁴⁴ Friedman, *supra* note 39 at 292.

²⁴⁵ Nelken, *supra* note 61 at 23.

remove something, or to be moved, from one place or person to another.”²⁴⁶ Alan Watson explains legal transplants as “the moving of a rule [...] from one country to another, or from one people to another.”²⁴⁷ Legal transplantation creates extraordinary change in legal systems. This change is not part of a given society’s routine legal culture; rather, it happens as a result of a deliberate legal process when new laws are needed to resolve societal problems.²⁴⁸ “Rule” in this context refers mostly to legislation that can be transplanted easily via the legislative process. As described above, this process may be initiated from either inside or outside the legal system. Initiation from outside may include pressure from international activists, academics, politicians, corporations and NGOs on issues of international trade, environmental crises and indigenous peoples’ rights. Legal transplants in the Thai legal system are common and shape law-making via a comparative law process. In Chapter 6 I will look at the effects of legal transplants on the communities that are the subjects of this study.

Pierre Legrand explains the scope of “rule” as an object of transplantation: he states that “rule” refers to more than just legislation.²⁴⁹ Legal transplants also include interpretations of transplanted law. This normally occurs in the process of legislative drafting, when a law is being commented on and compared with legislation of other countries.²⁵⁰ In the beginning of the public law era in Thailand, before the establishment of the Administrative Court, French and German legal ideology was used to explain the proper functioning of public law principles.²⁵¹

Such comparative legal study does not exist only inside the legal profession, but is also practised among NGOs and civil rights activists.²⁵² These activists and scholars try to find alternative ways to resolve their legal constraints and struggles with state law, and to find other

²⁴⁶ Cambridge Advanced Learner’s Dictionary, 3rd ed. (Cambridge: Cambridge University Press, 2008) s.v. “transplant”.

²⁴⁷ Alan Watson, *Legal Transplants*, 2d ed., (Athens, GA: University of Georgia Press, 1993) at 21.

²⁴⁸ Nelken, *supra* note 61 at 13.

²⁴⁹ Pierre Legrand, “What ‘Legal Transplants’?” in David Nelken & Johannes Feest, eds., *Adapting Legal Culture* (Oxford: Hart, 2001) 55 at 58.

²⁵⁰ See Boonsri Meewongukhoat, *Comparative Constitutional Law: Germany, the United States, and France* (in Thai) (Bangkok: Thammasart University Press, 1992); Wiruch Wiruchnipawan, *Thai Constitutional Court: Comparative Analysis of Structure, Power, and Personal Administration from the United States, England, France, Germany, and Japan* (in Thai) (Bangkok: Nititham, 2001).

²⁵¹ Worapoj Wisarutpit, *Rights and Liberty in the Constitution: Limitation of Rights and Liberty* (in Thai) (Bangkok: Winyuchon, 1995).

²⁵² See Sango Mahanty, et al., *Hanging in the Balance: Equity in Community-Based Natural Resource Management in Asia* (Bangkok: Regional Community Forestry Training Center and East-West Center, 2006); Regional Community Forestry Training Center, “Comparison of Village Forestry Planning Models Used in Laos”, 1999 series paper (Bangkok: Regional Community Forestry Training Center, 1999).

possibilities in different systems or interpretations of the law. There are examples of comparative law relating to natural resource management and civil disobedience from non-Western legal systems, namely from India, Peru and Brazil.²⁵³ Another kind of legal transplant is the trans-jurisdictional transplant, which can be applied across country- or community-level jurisdictional units depending on the level of “rule”. This action explains how ordinary people use legal transplants for their benefit in the broader legal culture outside the legal profession.

Legal transplants can be domesticated successfully in society. However, it is more likely that society will resist legal change by bringing up various arguments such as the top-down and bottom-up approaches, westernization, and Asian values. This resistance can be explained in internal and external legal culture regarding how society reacts to legal adaptations.²⁵⁴ Legal transplants connect the needs of a society to its relationship with the law.²⁵⁵

Legal transplants have occurred in Thailand since ancient times. For example, the *Mangraisart* of Lanna and the *Law of the Three Seals* of Siam adopted the *Law of Manu* from the Hindu legal system. The codifications in King Rama V’s time eventually incorporated modern civil law – including property law and land law – into Thai society. Forestry law and environmental law, especially regarding natural resource management, were also transplanted into the Thai legal system.

Legal and social changes that arise in a society depend on that society’s reaction to the changes. There are various characteristics of communities based on how they use law to serve their interests. The study of law and society focuses on actors like communities that make group-based claims for particular rights, and examines how the law responds to and recognizes these community demands.²⁵⁶ Roger Cotterrell classifies communities into four types based on their involvement in collective action:²⁵⁷ traditional communities, instrumental communities, communities of belief, and “affective” communities.

²⁵³ Alternative scholars and who are popular among Thai activists on the topic of alternative natural resource management are Vandana Shiva, Hernando de Soto and Movimento dos Trabalhadores Sem Terra, or MST. I use the word “alternative” intentionally to differentiate this group of scholars from North-Western capitalist scholars.

²⁵⁴ Nelken, *supra* note 61 at 27.

²⁵⁵ Roger Cotterrell, “Is There a Logic of Legal Transplants?” in David Nelken & Johannes Feest, eds., *Adapting Legal Culture* (Oxford: Hart, 2001) 71 at 83.

²⁵⁶ Cotterrell, *supra* note 63 at 40.

²⁵⁷ *Ibid.* at 68.

Traditional or local communities are located in particular geographic locations that share culture and language. Instrumental communities function based on their interests. Examples include business communities and political organizations such as labour unions. Communities of belief are based on values and include religious communities and environmental groups. Finally, affective communities are interdependent family and friendship groups. I will apply this explanation of the different types of communities to my analysis of the legal consciousness of the villagers, government officials and legal professionals in Chapters 4 and 5. This will help me to understand the characteristics of these communities and the relationships between them.

Cotterrell elaborates on the conditions that shape each of these types of communities. Firstly, community members have to have stable, sustained interactions and feel that they are connected, creating a sense of attachment.²⁵⁸ Secondly, members must share their interests and values. For example, traditional community members live in the same area and speak the same language. Thirdly, members normally have collective attitudes towards outsiders, as when traditional communities foster their ethnic pride and alienate outsiders. Finally, membership in a community can be voluntary or involuntary. For example, membership in an affective family community can be involuntary (i.e. through birth); otherwise, normally community membership is voluntary.

According to Cotterrell, these four types of communities function differently.²⁵⁹ Traditional communities might reflect the need of their legal consciousness to rely on geographical entity subordination. For instance, in Thailand, people in the south feel suppressed because of state law enforcement against violence and insurgency. Instrumental communities are mainly focused on self-regulation in order to respond to their own interests. Communities of belief try to maintain and pass on their values to others. Affective communities operate their relationships using family law, property, and family-based companies. An individual can be a member of several types of communities. Legal professionals can be considered as belonging to a traditional community because they operate in the same kinds of locations (legislatures, courts), and share the same forms of organization and legal language; however, legal professionals can also be considered as belonging to an

²⁵⁸ *Ibid.* at 70.

²⁵⁹ *Ibid.* at 76-77.

instrumental community when they are in the role of providing legal services.²⁶⁰ Depending on its function, each type of community reacts to the law differently.

Legal change, especially from legal transplants, can be generated in communities based on the types of those communities. Traditional communities are considered to be “weak” implementers of legal change due to their limited capacity to create social relationships.²⁶¹ I suggest “weak” as traditional community members do not bond together and do not have effective organizations or move collectively like other types of communities. When a community is “weak”, law enforcement in that community can be either strong or weak depending on how changes are embedded in the community’s legal culture. For example, state law enforcement in modern society is strong because it is the only way of securing community order while, in remote areas, state law enforcement is relatively weak because communities have other sources of order such as tradition and custom that are more compatible with their ways of life.

Legal professionals will be considered to be part of a traditional community for the purposes of this study. They use the law in a relatively strong way due to their attachment to the law. The three selected study communities would generally be classified as traditional communities because they function based on local administration. However, I have classified them as instrumental communities because they use the law as a tool to achieve their goal of practising CFM. Actually, I think communities can be classified as belonging to more than one type, and that classification should be relatively flexible because it depends on conditions of the community that may change. However, I will use the dominant characteristic of each community to classify it by community type.

In instrumental communities, people use the law to serve their interests in changing societies. Instrumental communities need interim regulations to create law and order during periods of social change. After society has adjusted to such changes, more solid regulations should be restored. An example of this is economic regulation of international trade organizations. Instrumental communities are also “weak” because their members only join when they want something to serve their purposes.²⁶² Legal transplants in this kind of community work more effectively than in other kinds of communities, as the law is tailored to

²⁶⁰ *Ibid.* at 212.

²⁶¹ *Ibid.*

²⁶² *Ibid.* at 213.

benefit instrumental communities. However, society is complex, reflecting people's many diverse demands and interests. Thus, the legal consciousness and legal culture of each instrumental community may be different. For example, regarding Thai CFM, the villagers' demands are sometimes in conflict with the objectives of environmentalists and this causes disputes about how to create legal change.

In communities of belief, legal transplants that match their values and beliefs will become embedded in their legal cultures. Normally, shared values in communities of belief establish strong bonds among community members. In contrast to the first two types of communities, when communities of belief have well-designed relationships, the legal connection to such communities can be weak, as they are only concerned with the law that is specific to their values. For example, socialist countries in Central Europe have transformed non-socialist legal ideologies, adjusting the law to fit with their beliefs. It is important in legal implementation to interpret and adapt transplanted laws to the community. In this study, I classify conservationist and environmentalist groups and religious communities as communities of belief. They use forestry law and environmental law to fit with their values.

Affective communities create intimate relationships in community and normally there are strong bonds among members such as relatives, spouses, and friends. These communities respond to legal change similarly to communities of belief; when a community is strong, the law is relatively "weak" because of the elusiveness of the relationships between community members.²⁶³ That is, a relationship within an affective community is hardly noticeable in public, so that the law cannot detect the connections among members of affective communities. Hence, the difficulty of legal implementation is to regulate community relationships appropriately and with regard to the interests of members. An example of legal change in an affective community is regulation of domestic violence and conflict of interest under politics and good governance.

As will be discussed further in Chapter 4, I have found that kinship is major factor in political and social organization of the selected communities in that leadership transfers through families and local organizations that alienate non-family members. This is another example of the operation of affective relationships. Actually, kinship is important throughout Thai society, especially in politics – both nationally and locally. However, kinship can have

²⁶³ *Ibid.* at 214.

either positive or negative affects in terms of interaction with law implementation. In terms of positive effects, kinship helps nurture the next generation and the leadership to maintain shared values in communities, as in the example of Tambon Maetha.²⁶⁴ In terms of negative effects, it can lead to alienating those outside the kinship relationship and to the creation of local “mafia” families, which is common in Thai local politics.

After understanding the relationship between law and society, it is important to understand legal history to learn about how power in social contexts shapes the law.²⁶⁵ My study criticizes the status quo in society that constructs legal rules in the context of social, political, and economic history. The work of Robert W. Gordon explains the application of legal studies to historical legal research.²⁶⁶ Gordon describes the legal study of history as a form of legal functionalism because it describes traditions and social structures that evaluate the rules of the legal system.²⁶⁷

In this study, I apply Gordon’s concept of the legal study of history to illustrate the history of each era of legal evaluation concerning CFM in Thailand. I hope the history and social context will reveal how the law has changed and will illuminate the processes in each era that contributed to such change.

Gordon provides a basic understanding of legal functionalism and its relationship to historical study, which he expresses by way of five propositions.²⁶⁸ According to Gordon, it is first necessary to think of law and society as separate social categories. Law and society each have their own descriptions and are independent of each other, but they are interrelated through various mechanisms, such as when people create laws to serve their needs and then create a system of sanctions to enforce such laws. Secondly, society uses the law to serve its needs, such as the needs to survive, to maintain stability and security, and to allocate resources. Gordon’s third proposition is that it is necessary to portray the movement that is derived from impersonal forces that change the law and society. However, I think the forces that cause change in society can also come from any kind of demand or even from shared values such as a

²⁶⁴ This will be discussed in more detail in Chapter 4, section 4.1.7.

²⁶⁵ Austin Sarat & Thomas R. Kearns, “Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction” in Austin Sarat & Thomas R. Kearns, eds., *History, Memory, and the Law* (Ann Arbor, MI: University of Michigan Press, 2002) at 1.

²⁶⁶ Robert W. Gordon, “Critical Legal Histories” (1984) 36 *Stanford Law Review* 57.

²⁶⁷ *Ibid.* at 59.

²⁶⁸ *Ibid.* at 60-65.

belief in the importance of environmental protection. This evolutionary development creates objectives, processes, and social roles.

Gordon's fourth claim focuses on the legal system's functional response to change through legal forms and institutions. Legal functionalists explain legal change using concepts from, namely, Montesquieu, Adam Smith, Karl Marx, Max Webber, and Roscoe Pound.

Finally, Gordon states that the legal system acclimatizes itself to social change. For example, law societies and law schools have been professionalized to serve social demands for legal service in modern society. For instance, human rights lawyers in Thailand have adjusted their legal services to fit the needs of villagers who practise CFM, as in the case of *Pati Ming*. However, this adaptation has not occurred quickly enough in Thai society in terms of applying the *Constitution*. This functionalism is a dominant feature of the legal system. For example, both legislators and judges have to be strictly impartial and focus only on legal doctrines and their implementation.

In contrast, legal realists pay attention to social needs and use their self-awareness to serve those social needs.²⁶⁹ Realists examine relationships between legal functions or dysfunctions and people. In my study, I use Ehrlich's concepts of living law and folk law to reflect realism, and I also apply Friedman's concepts of legal culture to reflect functionalism.

To enhance the social context of living law, legal phenomena in society have horizontal diversity; thus, time and place should be taken into consideration. Concepts of time and place reinforce legal pluralism and historical legal studies because they reveal differences of geographic location and dynamics of time. According to David Harvey, "place" means a territorial place-based identity that changes relative to the race, ethnicity, gender, religion, and class of people involved.²⁷⁰ Time adds more dynamics to the place where the study is located. For example, the historical interrelationships of people who live in a given place and their community development must be studied in order to understand the time and space dimensions.²⁷¹ Investigating the time and place of legal phenomena may reveal how

²⁶⁹ *Ibid.* at 66.

²⁷⁰ David Harvey, "From Space to Place and Back Again: Reflections of the Condition of Post-modernity" in Jon Bird, ed., *Mapping the Futures: Local Cultures, Global Change* (London: Routledge, 1993) 2 at 4.

²⁷¹ *Ibid.* at 8.

communities represent themselves, and how communities are comprised through actual social practices.²⁷²

This study tries to show the differences between the people in the north and the central parts of Thailand and to illustrate the dynamics of time by showing the differences between Lanna and Siam and modern Thai society in how legal adaptation has affected CFM. Local people and hill tribes also have different histories of settlement and different traditions that reflect differences in their legal consciousness.

In addition to the importance of time and place to legal mobilization in society, another critical concept is that the form of law depends on the place or community where it is practised. The living law concept values any kind of law in the everyday lives of people, including state law or local regulations, as long as it is actually used as law in society. Some positivists define law as formal law, or the authorized rules of a sovereign. Local administrations can enact their own regulations based on the concept of decentralization. Long-practiced traditions can be defined as customary law, which is created when people have been enforcing their rules for a long time via real sanctions. All of these concepts explain the nature of CFM regulation in this study. The traditional definition of "law" does not include a set of regulations that people create inside their communities and enforce among themselves and among outsiders who come into their communities. Presumably, outsiders accept such rules as if they were contracts. However, these kinds of regulations do not need to be long practiced in order to be classified as customary law. Further, sometimes these rules are recorded through a process of formal drafting. I will explain below how such internal community regulations become folk law.

The concept of folk law was originally intended to describe laws created by people who could not read or write in an otherwise literate society.²⁷³ "Folk" referred to ordinary people, especially peasants. In modern society, "folk" means any group of people who share a common connection, such as a common locality, ethnicity, career, or religion.²⁷⁴ The definition of "folk" is flexible and vague, so that when it is combined with "law", it refers to law that is oral, old, flexible, and created by anonymous people.²⁷⁵ The un-codified nature of folk law is undeniable

²⁷² *Ibid.* at 16.

²⁷³ Alison Dundes Renteln & Alan Dundes, "What is Folk Law?" in Alison Dundes Renteln & Alan Dundes, eds., *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*, vol. 1 (Madison, WI: University of Wisconsin Press, 1994) 1 at 1.

²⁷⁴ *Ibid.* at 2.

²⁷⁵ *Ibid.* at 3.

in circumstances such as conducting a case in court, studying folk law, and communicating with large members.²⁷⁶ As a result, the reduction of folk law to writing creates uniformity among diversity and reduces the flexibility of folk law.²⁷⁷

When folk law conflicts with state law, the court normally applies state law.²⁷⁸ However, to resolve this situation, people who use folk law may establish mediators who recognize folk law implementation in their communities. Dilemmas of implementation of folk law and state law can be understood as conflicts between Western and non-Western legal application. It depends on where the law comes from. To illustrate, in England, non-Western law is accepted as applying in non-Western communities as folk law.²⁷⁹ On the other hand, in societies that practice folk law but later are forced to adopt Western law, the dominant legal system will be applied as “civilized” law. Conflicts between folk law and state law will continue to occur unless the legal system becomes more accepting of legal pluralism.

The concept of folk law fits with the laws and traditions of the hill tribes. However, modern CFM regulations do not have the characteristics of folk law – they are written, and not old. Thus, I think CFM regulations can be more suitably explained as being part of the regulation of the commons.

Living law concepts are alive and real. They help ordinary people and legal professionals understand and use the law to serve needs in society and fulfill the objectives of law.

2.5 Chapter Conclusion

The four broad legal concepts that are used to support my research are legal consciousness, legal culture, green legal theory, and living law. Legal consciousness and legal culture are foundational ideas for this study, and have helped me to explore how people think and use the law in their roles in CFM implementation. I use legal consciousness and legal

²⁷⁶ Taslim Olawale Elias, “The Problem of Reducing Customary Laws to Writing” in Alison Dundes Renteln & Alan Dundes, eds., *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*, vol. 2 (Madison, WI: University of Wisconsin Press, 1994) 319 at 322.

²⁷⁷ *Ibid.* at 330.

²⁷⁸ L.C. Green, “‘Civilized’ Law and ‘Primitive’ Peoples” in Alison Dundes Renteln & Alan Dundes, eds., *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*, vol. 1 (Madison, WI: University of Wisconsin Press, 1994) 753 at 771.

²⁷⁹ R.D. Kollwijn, “Conflicts of Western and Non-Western Law” in Alison Dundes Renteln & Alan Dundes, eds., *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*, vol. 1 (Madison, WI: University of Wisconsin Press, 1994) 775 at 792.

culture approaches as research tools. In my interviews with villagers, government agents and legal professionals, I investigated their legal consciousness regarding CFM implementation. I use the legal culture approach to find Thai legal culture within formal structures in professional legal institutes by looking at the historical contexts of the Thai legal system, and at internal professional structures such as the law-making process, legal education, commentaries and textbooks, and court decisions.

In this study, I apply green legal theory as a critical tool to examine the law and legal ideologies concerning CFM. The legal ideologies that I choose to employ here are based on green legal theory – namely: the new naturalism, which sets out basic principles concerning environmental law and people’s rights; state power, which governs natural resources; the principle of the commons, on which was based the right of the people to use common or Crown land; legal pluralism, which opens up the possibility of more cooperative management between state power and the commons; and indigenous critical legal theory, which suggests indigenous laws should be respected and applied in harmonizing modern and traditional natural resource management.

Finally, I use the theory of the living law to explain phenomena related to CFM and legal implementation. In the living law section, I describe legal and social changes in order to emphasize how living law interacts with people and how people react to the law in different ways. I have also applied a historical legal approach, investigating legal transplants and undertaking documentary research to unfold the Thai legal culture that is hidden in the black letter law. All of these legal theories and concepts are applied to shed light on Thai legal culture.

In the next chapter, I will provide the details and contents of the law concerning CFM in Thailand. I will show the development and adaptation of CFM law, revealing the changes that resulted from people’s political and social movements, and how parts of CFM law eventually ended up as black letter law.

CHAPTER 3 COMMUNITY FOREST MANAGEMENT AND THE LAW IN THAILAND

This chapter will outline the history of forest management in Thailand from before the establishment of the nation state until the present day. I divide this history into four periods by reference to the major shifts that occurred in Thai legal consciousness.

Starting before the creation of the nation state of Siam,¹ the first period was the period of pre-colonial natural resource management. At this time, the land was vast relative to the population. Therefore, the people and communities had free access to the lands and natural resources and managed their own forest lands. However, state land management was based on the feudal system and the concept of Crown land.

King Rama V's major reformation of Thailand created big changes in the legal system and administration. In 1893, Siam, via King Rama V, founded the Thai Royal Forestry Department (RFD). Although Thailand has never been colonized, the concept of natural resource management was shaped by British advisors, who used similar laws in Malaysia for licensing logging and placing natural resources under government management. This was the second era of Thai forest management.

The grassroots movement in the 1990s, and the *Constitution of 1997*, which guaranteed community rights to participate in natural resource conservation, gave birth to CFM in Thai law. This led to the third era of natural resource management – the era of CFM. However, CFM has never been officially enforced, despite the fact that it has been practised in many places.

The *Community Forest Bill* was terminated by the Constitutional Court in November 2008, which was a milestone for CFM and marked the fourth era, the present day, in which the law is open to new interpretations. Now, CFM is hanging in the balance, because it does not have a supporting statute and the Thai legal culture does not apply the *Constitution* directly to protect people's rights to practise CFM.

3.1 Pre-Colonial Natural Resource Management

Before its inclusion in the modern state of Siam, northern Thailand was known as a rich, mountainous area with plentiful agricultural lands, as suggested by its Thai name "Lanna",

¹ Thailand was called "Siam" until 1939, when Phibun Songkhram changed the name of the country to Thailand. *Constitution Concerning the Name of the Country 1939*, Royal Thai Government Gazette 56 (6 October 1939) 980.

which means “millions of rice paddies”.² Prior to 1874, there was no centralized system of government or law in this region.³ Then, under King Rama V, the northern region was merged into the Siamese nation state,⁴ which had originated in Bangkok and the Chao Phraya basin. Under nationalization, nearly every aspect of northern Thai society, including law, administration, transportation, and local custom, had changed with the tide of development.⁵ Collective activities such as communal land use practices were almost eliminated by modern Thai law and centralized administration.⁶

Before the Kingdom of Siam, known as Thailand today, was settled, the Kingdom of Lanna existed in the mountainous area in the north. In the high mountains, ethnic groups (so-called “hill tribes”) lived and migrated in the rich forest. Meanwhile, the local people lived in the basin of the Ping and Wang Rivers. During that time, there was free access to natural resources because the state did not have much control over the vast land, and management of natural resources was mostly based on community principles.

Community rights and practices have existed in Thai society as long ago as when the Lanna Kingdom was first founded in 1296.⁷

People in the north, both lowland people and hill tribes, plant their crops along the valleys and on the mountains. Hill tribe peoples practice traditional cultivation⁸ in the highlands using what is called “shifting cultivation”. The law in Lanna was called the *Mangraisart*. In Siam, the *Law of the Three Seals* and feudalism applied to land management. However, at that time, there was still free access to forest land in the remote areas, because state power was not strong enough to oversee all areas in the mountains. The forest in the mountain region has played two important roles for the local people. On the one hand, the forest was a spiritual place. People believed that unexplained incidents were the result of actions of forest spirits,

² Michael Freeman, *Lanna: Thailand's Northern Kingdom* (London: River, 2001) at 11.

³ Chris Baker & Pasuk Phongpaichit, *A History of Thailand* (Cambridge: Cambridge University Press, 2005) at 54.

⁴ The ancestor of the Siamese nation state was a kingdom called Ayudthaya, or Siam, which was a separate kingdom located to the south of Lanna.

⁵ Baker & Phongpaichit, *supra* note 3 at 65.

⁶ Peter Vandergeest & Nancy Lee Peluso, “Genealogies of the Political Forest and Customary Rights in Indonesia, Malaysia, and Thailand” (2001) 60:3 *Journal of Asian Studies* 762.

⁷ Sarasawadee Ongsakul, *History of Lanna*, 6th ed. (in Thai) (Bangkok: Ammarin, 2007).

⁸ Dietrich Schmidt Vogt, “Defining Degradation: The Impacts of Swidden on Forest in Northern Thailand” (1998) 18:2 *Mountain Research and Development* 135.

and this made people respect the forest as a sacred place. On the other hand, the forest was a place of refuge for people who needed to escape from the power of the state.⁹ At the same time, many ethnic groups, known as hill tribes, lived in the high mountain areas.¹⁰

3.1.1 Law of Lanna: *Mangraisart*

Lanna was founded in 1296 when King Mangrai occupied Hariphunchai and then built his new capital in Chiang Mai.¹¹ The recognized written law of Lanna was the *Mangraisart*, or “the Law of King Mangrai”.¹² The *Mangraisart* was the foundation and justification for the king’s rule, and was based on dharma,¹³ Buddhist ethical principles of Indian origin. According to legend, the law was instituted by Pra Manu, who flew near the horizon, finding this written law and bringing it back to earth. It was viewed as the law of man, but also as universal natural law.¹⁴ The *Mangraisart* governed many aspects of citizens’ conduct, such as the responsibility of commoners to go to war, theft, and matrimonial property.

The first part of the *Mangraisart* covered the commoners’ role in military management and preparation for war, as it set up a system of manpower control and military organization.¹⁵ This system focused on people rather than on territory and land. However, land could be given or confiscated as a reward or punishment. For example, when the army won a battle with an enemy, soldiers would be given land as a reward. However, if a soldier deserted during wartime, he would be executed and his property would be taken away from his family.¹⁶

⁹ Rattanaporn Setthakul, *History of Economic and Culture in Chiang Mai – Lumphon Valley* (in Thai) (Chiang Mai: Silkworm, 2009) at 1.

¹⁰ Chupinit Kesmanee, “Dubious Development Concepts in the Thai Highlands: The Chao Khao in Transition” (1994) 28 *Law & Society Review* 676.

¹¹ Aroonrut Wichienkeo, “Lanna Customary Law” in Andrew Huxley, ed., *Thai Law: Buddhist Law: Essays on the Legal History of Thailand, Laos, and Burma* (Bangkok: White Orchid, 1996) 31 at 31.

¹² *Ibid.*

¹³ “Dharma” is the belief in Buddhism that everything has its own place in the natural order. In fact, dharma (or, “dhamma”) is an expression of the belief in natural law.

¹⁴ *Mangraisart, Or the Law of King Mangrai* (in Thai) (Wat Saw Hai, Sarapuri Manuscript, 1799), trans. by Prasert NaNakorn (Bangkok: History Department of Srinakharinwirot University, 1978) [*Mangraisart*].

¹⁵ The law set up a system of control stipulating that “10 commoners shall have one master”. This was called “Nai Sip” (“master of 10”). The Nai Sip had responsibility to communicate with his group about their mission in an orderly fashion. This system established control groups of 10, 50, 100, 1,000, 10,000, and 100,000, with the king as ultimate commander. *Ibid.* at 2.

¹⁶ *Ibid.* at 4.

The *Mangraisart* did not specifically mention land as property, or land acquisition. However, the law recognized land ownership in a section on prescription (the time limit for filing a case in court), as it referred to the fact that land disputes had a 20-year limitation period, the same as for other severe crimes such as murder or robbery.¹⁷ Another section stated that if cattle caused any damage to rice in a neighbour's rice paddy, the owner of the cattle had to compensate the rice owner.¹⁸ Moreover, rice paddies were important in *Mangraisart*, as anyone who disturbed or caused damage to the rice in the field had to pay a steep fine or compensate the rice owner.¹⁹ The law also contained provisions about renting rice paddies and described the relationship between rice paddy owners and their tenants.²⁰

There was a concept of communal land management in *Mangraisart* called "Na Khum", meaning "source of a rice field", which is similar to the Western concept of tenant farming or, in some cases, "sharecropping".²¹ Na Khum was the property of a lord, or "Praya". This concept allowed commoners to use these lands for plantations and to repay the lord by paying rent or sharing the crops. The right to use such lands could not be transferred or inherited. A person who received the right to use this kind of land was called a "Chao Khum". A Chao Khum could use Na Khum lands for himself or could have someone else rent the land and collect the rent, but if a Chao Khum did not use or allow someone else to use the land, then it would be given back to the commons and the right granted to other people. The idea of Na Khum showed that the law of Lanna contained concepts of communal resources and the use of the commons.

In terms of natural resource conservation, the *Mangraisart* contained references to the protection of spirit trees, or "Sua Ban";²² if someone cut a tree and that action led to disturbing the spirit of the city or town, that person had to apologize to the spirit by performing a ceremony.²³ While the purpose of this rule was not specifically to preserve trees, its result was

¹⁷ *Ibid.* at 12.

¹⁸ *Ibid.* at 80-82.

¹⁹ *Ibid.* at 100-101.

²⁰ *Ibid.* at 102-107.

²¹ Pitinai Chaisaengsukkul, *et al.*, *Basic Research on Laws of the Siamese Kingdom* (in Thai), research project from December 1990-June 1994 on the occasion of the 60th anniversary of Thammasart University (Bangkok: Toyota Foundation, 1994) at 538.

²² In the north, people believe that every village and city has a protective spirit, and that this spirit lives in a large tree, such as a bodhi tree.

²³ *Mangraisart*, *supra* note 14 at 85.

to preserve the large trees that the community believed were protected by spirits. Also, it showed integration of the law and belief in the supernatural.

Many rules in the *Mangraisart* demonstrated protection of agriculture and people's plantations. For example, the law contained several sections about imposing fines on people caught causing damage to rice paddies, irrigation systems, or orchards. Also, people had to control their cattle and not let them eat other people's rice. Another section was aimed at protecting personal property, and stated that a person who cut down the fruit tree of another person had to pay compensation such as a coconut palm, betel nut palm or chilli plant.²⁴

Near the end of the *Mangraisart*, the concept of Crown land was discussed. The law stated that if anyone wanted to clear forest land that was not occupied and was not the land of any lord, or Praya, that person had to ask for permission from the ruler, because all the land belonged to the king.²⁵ According to this concept of Crown land, if anyone cut a tree in the forest, that person had to pay the cost of the tree. In addition, if anyone hunted wild animals, such as buffalo, birds, or deer, that person had to pay the fine designated for that kind of animal.²⁶

We know from the manuscript of the written law of Lanna that it contained concepts concerning use of land and natural resources, but we know very little about its implementation. At least, we know that the concept of community existed in this legal system, as did ideas about public lands and concerns about nature and spirituality.

3.1.2 Law of Siam: *Law of the Three Seals*

To the south of Lanna was another kingdom, the first kingdom of Siam, known as Sukhothai (1238 – 1438 A.D.). This kingdom had a great king named King Ramkhumhaeng, who lived during the same period as King Mangrai of Lanna. King Ramkhumhaeng created the Thai alphabet and wrote the *Silajaruek*, a stone inscription setting out various laws.²⁷ On the

²⁴ *Ibid.* at 86.

²⁵ *Ibid.* at 110.

²⁶ *Ibid.* at 118.

²⁷ The *Silajaruek Sukhothai*: the stone inscription of King *Ramkamhaeng* (*Sukhothai* period 1257-1317 A.D.); see Danai Chaiyotha, *Thai History: From the Prehistory Period to the Decline of Sukhothai* (in Thai) (Bangkok: Odian Store, 2003). This inscription mentions that there were many fruit trees planted in the capital at that time.

reverse of the *Silajaruek*, it stated that if anyone cleared and planted on unoccupied land, that land would belong to the one who planted it.²⁸

After the decline of Sukhothai, Ayutthaya, further south from Sukhothai, was raised up and expanded its power into the north and took over Sukhothai. In Ayutthaya, the law was based on the king's decrees and was written down in a series called *Pra Aiyakarn Betset*.²⁹ There were two main sources of law in the Ayutthaya period. One was the *Dharmasart* – or *Law of Dharma*,³⁰ which was adopted from Pra Manu in India and adapted according to the local beliefs in Siam. Another was *Rachasart* – or, *Order of the King* – which was a collection of the orders made by the king in his legal decisions and applied to subsequent cases. These sets of orders made up the law that was enforced from the Ayutthaya period (1350 to 1767) until the Rathanakosin³¹ era (from 1782). Later, King Rama I established a group of juries and judges to revise these laws, and called them the *Law of the Three Seals*, as the book of these laws had a picture of three seals on its cover.³²

Pra Aiyakarn Betset no. 52 declared that the king owned all the land in the kingdom, and the people occupied the land with the king's permission.³³ According to this concept, the king could revoke land rights at any time and the land was not subject to sale. However, the concept stating that the king owned all the land might be confused with the concept that the king reigned over the country.³⁴ Also, in the past, the idea of ownership was applied in the same way as the idea of controlling power; for example, the rule that a father had authority over his children was the same as the rule that the father owned his children. This principle was similarly applied to equate land ownership with the control of that land.

²⁸ *Ibid.*

²⁹ The word "aiyakarn" means both "rule" or "law" and "prosecution". This word is also the same word that is used for "public prosecutor" today. *Thai Dictionary of the Royal Institution 1999 s.v. พระไอยการ* ("aiyakarn"),

³⁰ "Dharma" means "law" or "natural law" in Sanskrit. Thai adopted this word, which has a similar meaning to the original. "Dharma", in Thai, means "good", "right", and "justice". "Sart", in Thai, means "subject" or "knowledge", and is normally used as a suffix.

³¹ Rattanakosin was the regime that was in power after Ayutthaya collapsed, and the Siamese capital was moved to Thunburi, and later to Bangkok with the creation of the new kingdom under the Chakri Dynasty.

³² René Guyon, *The Work of Codification in Siam* (in Thai), trans. by Surapon Triwit (Bangkok: Winyuchon, 2002) at 18-23.

³³ Robert Lingat, *History of Thai Law*, vols. 1 & 2 (in Thai), Chanvit Kasetsiri & Wikan Phongphanitanon, eds. (Bangkok: Social Sciences and Humanity Foundation for Thammasart University, 1983) at 308.

³⁴ *Ibid.* at 309.

According to the concept of Crown land, *Pra Aiyakarn Betset* nos. 52 and 54 provided that commoners could not purchase or sell land. As a result of feudalism, the king would give lands to his lords and knights according to the hierarchy of their titles, namely Praya and Chao Praya. However, the land could be transferred by inheritance, gift, or payment for debt under *Pra Aiyakarn Betset* nos. 49, 50 and 75.³⁵

In terms of forest management, in the law of ancient Siam, the forest was considered to be waste land, and if someone cleared and planted it or used it to expand his or her household, this would be appreciated by the king, because the person who used the land had to pay tax depending on the value of the land's production. According to *Pra Aiyakarn Betset* no. 44, if someone occupied the land and later did not use it for anything and wasted it, the authorities could take the land back and give it to another person who did not have land.³⁶

In general, at that time, "forest" simply referred to land that no one occupied that belonged to the king. However, the state power depended on the king's power and the distance from the capital was one of the factors in law enforcement. Also, remote communities had their own rulers who had to pay tribute to the king in Ayutthaya under the feudal system. Later, when Ayutthaya expanded its power to the north and reached Lanna, the two kingdoms traded with each other. Therefore, the law of Ayutthaya also influenced that of Lanna, until the arrival of Westerners during the colonial period.

3.1.3 Building the Nation State and Uniting the Law: Siam's Codification

After Siam expelled Burma from Ayutthaya and founded the new capital Bangkok, also named Rattanakosin, Lanna was freed from Burmese control and rebuilt its kingdom. However, Lanna continued to have diplomatic relations with Siam.³⁷ During the colonial era, Western countries came to Southeast Asia and, in 1826, the British first colonized neighbouring Burma, and then expanded their logging business with Lanna's king. When Lanna became a colony of Siam during the reign of King Rama V,³⁸ the threat of Western occupation became more serious. Many treaties were signed, since King Rama IV then ruled Lanna as well. Some

³⁵ *Ibid.* at 316.

³⁶ *Ibid.* at 321.

³⁷ Ongsakul, *supra* note 7 at 313.

³⁸ *Ibid.* at 409.

treaties were concerned with trade agreements and some gave extraterritorial jurisdiction to the people under authority of Western countries such as Britain, France, and the United States.

Siam began to trade with other countries during the reign of King Rama III. The threat of colonization by Western countries was real during the reign of King Rama IV, when Siam was forced to sign a treaty with British, the *Bowring Treaty*. Afterwards, Siam had to sign an extraterritorial agreement with almost every country that came to Southeast Asia, for example: Britain, France, the United States, Denmark, and Japan.³⁹ Because Siam had increasing contact with foreign countries, it became necessary to reform the legal system for two reasons. One reason was external: Siam had lost control over its own independent adjudication system to other countries. The other reason was internal: Siamese society was changing with the new world order, and it needed to improve the law to keep up with modern society.

The influence of extraterritorial laws was the main reason that Siam needed to reform their legal system. Foreigners stated that they would avoid the Thai law at that time, charging that the system of trial and punishment, known as “Jareed Nakornbarn”,⁴⁰ was extremely cruel. Moreover, reformation of the Thai legal system was needed, as King Rama V had compared the law to an old ship: its holes had been sealed, but it was still rotting and waiting to sink; therefore, he argued, Siam needed to rebuild the structure so that the ship would sail smoothly.⁴¹ This meant that the law at that time, even after being revised as the *Law of the Three Seals*, was still unjust and dated, because society had changed due to the influences from contact with Western countries.

To prove they had a “civilized” legal system, Siam chose to adopt the civil law system and also hired many foreigners who were legal experts to join drafting committees with supervision from Thai committee members. Hence, law reform under King Rama V was deliberately structured based on universal legal concepts that were internationally accepted; meanwhile, it had to be adapted to Thai culture.⁴²

³⁹ Direk Jayanama, *Ending the Extraterritorial Agreement in Siam* (in Thai), published in memory of Seang Panomyong (Bangkok: Bamrungnukoonkit, 1936) [archived at Chiang Mai University Library].

⁴⁰ “Jareed Nakornbarn” referred to trial by ordeal, since, in the Ayutthaya period, suspects were tortured as well as punished. For example, a prisoner might be placed inside a big bamboo ball which had sharp metal pins sticking inside, and then the ball would be kicked around by elephants. See “Trial by Ordeal in the Law of Three Seals” (in Thai), Museum of the Department of Correction, online: Government of Thailand <<http://www.correct.go.th/mu/index3.html>>.

⁴¹ Lingat, *supra* note 33 at 30.

⁴² *Ibid.* at 42-45.

As a result of the reforms during the reign of King Rama V, Lanna officially became part of Siam, although it had been a colony of Siam since 1884.⁴³ After the unification, the law of Siam also applied to Lanna. The legal and administrative reforms were eventually accomplished after decades of drafting and adjusting. The modern legal system merged with the local culture and became the unified law for the Kingdom of Siam.

3.2 Legislature Governing Forest Areas: Royal Forest Department Era

During the colonial period in which Siam adopted the Western legal system based on individual rights,⁴⁴ common goods became part of the public domain, and barriers to access were created.⁴⁵ Community management was transferred into the hands of government agencies under centralized administration. Modern law, which relied on state-based legislation, took community rights away from grassroots people, in this case local people and hill tribes.

3.2.1 Thai Legal System Concerning the Forest

During the very first period of Siam, the people occupied the land and utilized the land for their own purposes.⁴⁶ Later, under the Ayutthaya regime (1350-1767 A.D.) the influence of feudalism changed free access to land for all people into state land; all land then belonged to the king and a person who wanted to use the land had to obtain a grant to do so.⁴⁷ In ancient times, when a person utilized any land in remote areas far from the centres of state power, including forest land, he or she would have rights over that land, and could claim ownership. In the 1900s, Thailand became a nation state and expanded state power, along with reformed laws and administration, into a formal civil law system⁴⁸ using the public trust doctrine to manage public land, including forest areas.⁴⁹ As a result of social and economic development

⁴³ Ongsakul, *supra* note 7, at 422.

⁴⁴ Larry Lohmann, "Land, Power and Forest Colonization in Thailand" (1993) 3:4/6 *The Political Ecology of Southeast Asian Forests: Transdisciplinary Discourses* 180 at 182.

⁴⁵ Peter Vandergeest & Nancy Lee Peluso, "Territorialization and State Power in Thailand" (1995) 24 *Theory and Society* 385 at 398.

⁴⁶ Chaiyotha, *supra* note 27.

⁴⁷ Direk Jayanama, *The Evolution of Thai Laws* (Born: Royal Thai Embassy, 1964) at 8-9.

⁴⁸ Guyon, *supra* note 32 at 42-47.

⁴⁹ Vandergeest & Peluso, *supra* note 45 at 390-391.

beginning in the 1960s,⁵⁰ the land slowly turned into capital – a fundamental principle under the code law system which has been in place since the creation of the Roman law.⁵¹ Unoccupied land was in the public domain and the state gained power over that land. I will describe these legal concepts according to the order prescribed by the Thai legal hierarchy: the *Constitution*, the code law, and statutes.

3.2.2 The Major Law: Code Law

After the law was reformed during the reign of King Rama V, Siam drafted the *Civil and Commercial Code* and the *Land Code*, and established the Royal Forest Department (RFD).⁵² The paramount outcome of law reform since the period of King Rama V has been the civil law system and positivist legal culture.⁵³ These are the major legal changes that have affected land management. In the last two decades, Thailand has added more legal concepts to its natural resources management scheme by enacting more environmental law statutes and amending the *Constitution*.

Being a general code about land, the *Civil and Commercial Code*,⁵⁴ enacted in 1936, has governed three major issues concerning the customary rights of hill tribe peoples to conduct community forest management. The first important role concerns customary rights – that is, the provision provides an opportunity to use custom⁵⁵ when there is no written law governing a

⁵⁰ Office of the National Economic and Social Development Board (NESDB), 1st *National Economic and Social Development Plan (1961-1966)* (in Thai), online: NESDB <<http://www.nesdb.go.th/Default.aspx?tabid=83>>.

⁵¹ *Supra* note 32 at 204-205.

⁵² Thailand established a drafting committee to draft the *Civil and Commercial Code* in 1908 and to finish the first volume and enact it in 1908. The *Civil and Commercial Code*, volume IV, which contains laws on property, was enacted in 1930; the last volume, VI, was completed and enacted in 1936. *Ibid.* at 82-97.

The development of the *Land Code* began in the 1910s with the land registry system and the first legislation on land titles was enacted in 1919. See Pasakorn Chonhaurai, *Land Law: Commentary* (in Thai) (Bangkok: Niti Bannakarn, 1993) at 165.

The RFD was founded in 1896. Royal Forest Department, *100 Years of Royal Forest Department* (in Thai) (Chiang Mai: Royal Forest Department Region 1, 1996).

⁵³ Andrew Harding, "The Eclipse of the Astrologers: King Mongkot, His Successors, and the Reformation of Law in Thailand" in Penelope Nicholson & Sarah Biddulph, eds., *Examining Practice, Interrogating Theory* (Leiden: Martinus Nijhoff, 2008) 305 at 318.

⁵⁴ The *Civil and Commercial Code* adopted these concepts from the Romano-Germanic family of laws.

⁵⁵ In this study, I use the terms "custom" and "practice", although the distinction between them is somewhat blurred; more research is also required to distinguish between the definition of "custom" in the Thai legal context and among the hill tribe peoples. At this early stage, I intend to use the word "practice" when describing actual acts of hill tribe peoples such as farming or regulating the forest.

case.⁵⁶ However, in practice, this law has become a major obstacle to the preservation of customary rights in Thailand because there are hardly any situations found to which no written laws apply. Instead, most of the written law aims to overrule the traditional laws and practices of the hill peoples, and tries to reinforce a unified legal system.

Another difficulty is that community forest management relates directly to the land. The *Civil and Commercial Code* sets out laws about private property in general, including property in the family.⁵⁷ The provisions in the *Civil and Commercial Code* establish the basic qualifications of “persons who may own and dispose of property, and conditions that need to be fulfilled to establish ownership”.⁵⁸ Land is real property under the definition in the *Civil and Commercial Code*, so the concept of ownership applies to land.⁵⁹ Property rights under the *Civil and Commercial Code* have been guaranteed for individual and juristic persons under Thai law. The problem is that the law does not acknowledge the concept of community rights. Hence, the *Civil and Commercial Code* leaves a big gap for community forest management because communal forests are not strictly seen as being privately owned.

The *Civil and Commercial Code* also establishes a concept of public domain.⁶⁰ Public or state land is in the public domain and a person cannot occupy or transfer such land without complying with the laws enacted for this specific purpose.⁶¹ This principle is linked to the concept in the *Land Code* and other laws. According to the *Land Code*, all unoccupied land belongs to the state.⁶² Parallel with *Land Code*, the *Forest Act* defines “forest”, which means land that no one has occupied.⁶³ In addition, other laws can establish the status of public domain for land, for example, by gazetting the land as a forest reserve,⁶⁴ national park,⁶⁵ or

My thanks to Professor Hester Lessard for her comments on this issue, on March 27, 2009.

⁵⁶ *Civil and Commercial Code*, Royal Thai Government Gazette 196:42 (8 April 1992), s. 4.

⁵⁷ *Ibid.* Book V, “Property”, and Book VI, “Succession”.

⁵⁸ Sophon Ratanakhon, “Legal Aspects of Land Occupation and Development” in Peter Kunstadter, E. C. Chapman & Sanga Sabhasri, eds. *Farmers in the Forest* (Honolulu: East - West Center, 1978) at 46-47.

⁵⁹ *Civil and Commercial Code*, *supra* note 56, ss. 139, 1334, and 1336.

According to s. 1334 of the *Civil and Commercial Code*, a person may acquire waste land, surrendered land, and abandoned land under the procedures in the *Land Code*.

⁶⁰ *Ibid.*, s. 1304.

⁶¹ *Ibid.*, s. 1305-1307.

⁶² *Land Code*, Royal Thai Government Gazette 71:78 (30 November 1954), s.2.

⁶³ *Forest Act 1941*, Royal Thai Government Gazette 58 (15 October 1941) 1417, s. 4(1).

⁶⁴ *National Forest Reserve Act 1964*, Royal Thai Government Gazette 81:38 (28 April 1964) 263.

wildlife sanctuary.⁶⁶ Subsequently, such land cannot be legally possessed by any entity other than the state. At this point, the people who live in the forest are legally excluded from the land.

When a person owns land governed by the *Civil and Commercial Code*, that person can gain title to the land under the *Land Code*. However, the *Land Code* only allows land ownership for Thai citizens.⁶⁷ Therefore, hill tribe peoples can be targeted for discrimination if they do not have Thai citizenship.

According to the *Land Code*, all unoccupied land throughout the country became forests under the authority of the RFD and DNWP. Thus, it became part of the public domain, which means that hill tribe peoples are subject to relocation or forced eviction. Other than the law, Thai government policies and agencies also cause problems for local people and hill tribes who live in the forest.

3.2.3 The Practical Law: Forestry Laws

Siam founded the Royal Forest Department in 1896 to conduct logging licensing.⁶⁸ Four major forestry laws have since dominated forest management in Thailand. The first law enacted was the *Forest Act 1941*.⁶⁹ Mainly, the *Forest Act* regulates logging licensing.⁷⁰ Also, anyone who wants to collect non-timber products in the forest requires permission from the RFD.⁷¹

The second law was the *National Park Act 1961*.⁷² This act established restricted areas by royal decree,⁷³ and provides that such lands must not be owned or legally possessed by any

⁶⁵ *National Park Act 1961*, Royal Thai Government Gazette 78:80 (3 October 1961) 1071/3.

⁶⁶ *Conservation and Protection of Wildlife Act 1992*, Royal Thai Government Gazette 109:15 (28 February 1992) [*Wildlife Sanctuary Act*].

⁶⁷ Generally, land ownership by non-Thais is restricted, except under special treaties and for investment purposes, which have to be approved by the Ministry of the Interior. *Land Code*, *supra* note 62, Title 8 and Title 9.

⁶⁸ Gregory A. Barton & Brett M. Bennett, "Forestry as Foreign Policy: Anglo-Siamese Relations and the Origins of Britain's Informal Empire in the Teak Forests of Northern Siam, 1883-1925" (2010) 34:2 *Itinerario* 65.

⁶⁹ *Forest Act 1941*, *supra* note 63.

⁷⁰ *Ibid.*, s. 29.

⁷¹ *Ibid.*, s. 54.

⁷² *National Park Act 1961*, *supra* note 65.

⁷³ *Ibid.*, s. 6. "When it is deemed appropriate to determine any area of land, the natural feature of which is of interest, to be maintained with a view to preserving it for the benefit of public education and amenity, the

person.⁷⁴ In general, this law prohibits any action in a national park that would be harmful for the forest and the land.⁷⁵ The government agency that has direct authority over national parks is the Department of National Parks and Wildlife and Plant Conservation (DNWP).⁷⁶

The third law enacted was the *National Forest Reserve Act 1964*,⁷⁷ which also created forest reserves under authority of the RFD. The principles in this statute follow the concepts in the *National Park Act*; however, the process for establishing forest reserves is easier, and can be launched by ministerial regulation.⁷⁸ As with the *National Park Act*, this law prohibits any action that would be harmful to the forest and the land. The difference is that the RFD can permit a person to use the forest reserve for five to 30 years.⁷⁹

The last law enacted concerning forest management was the *Conservation and Protection of Wildlife Act 1992*.⁸⁰ This law set up a process to legislate wildlife sanctuaries by royal decree⁸¹

Government shall have the power to do so by a Royal Decree with a map annexed thereto showing the boundary lines of the determined area. The determined area shall be called the 'National Park'."

⁷⁴ *Ibid.*, s. 6, p. 2.

⁷⁵ *Ibid.*, s. 16: "Within the national park, no person shall:

- (1) hold or possess land, nor clear or burn the forest;
- (2) collect, take out, or do by any means whatsoever things endangering or deteriorating woody plants, gum, yang wood oil, turpentine, minerals or other natural resources;
- (3) take out animals or do by any means whatsoever things endangering animals;
- (4) do by any means whatsoever things endangering or deteriorating soil, rock, gravel or sand;
- (5) change a water-way or cause the water in a river, creek, swamp or marsh to overflow or dry up;
- (6) close or obstruct a watercourse or way;
- (7) collect, take out, or do by any means whatsoever things endangering or deteriorating orchids, honey, lac, charcoal, barks or guano;
- (8) collect or do by any means whatsoever things endangering flowers, leaves or fruits;
- (9) take in or take out any vehicle or drive it on a way not provided for such purpose, unless permission is obtained from a competent official;
- (10) cause any aircraft to take off or land in a place not provided for such purpose, unless permission is obtained from a competent official;
- (11) take cattle in or allow them to enter;
- (12) take in any domestic animal or beast of burden, unless he has complied with the Rules prescribed by the Director-General and approved by the Minister [...]"

⁷⁶ *Departmental and Government Agency Improvement and Administrative Reorganization Act 2002*, Royal Thai Government Gazette 119:99 (2 October 2002), s. 22.

⁷⁷ *National Forest Reserve Act 1964*, *supra* note 64.

⁷⁸ *Ibid.*, s. 6.

⁷⁹ *Ibid.*, s. 16.

⁸⁰ *Wildlife Sanctuary Act 1992*, *supra* note 66.

under the same principle as the *National Park Act*. Wildlife sanctuaries are under the authority of the DNWP.⁸² This law is the strictest, and does not allow any person to access a wildlife sanctuary without permission.⁸³ However, the activities prohibited within wildlife sanctuaries are similar to those prohibited in other restricted areas.⁸⁴

Although the Thai forestry laws are based on the principle that restricted areas are designated following the guidelines regarding protected areas set out by the International Centre for Environmental Management, especially in national parks and wildlife sanctuaries, which may not be owned or legally possessed by any person, the process for proving land rights is complicated and characterized by long disputes.⁸⁵ Most villagers, especially members of hill tribes, do not know their rights. Hence, in many cases, the creation of restricted areas displaces them from their land, while many communities still live in forest areas and continue their traditions of cultivation.

This technique of cultivation is divided into two distinct types, pioneer swiddening and rotational swiddening.⁸⁶ Pioneer swiddening⁸⁷ is practiced among Hmong, Yao, Lahu, Lisu, and Akha, who use the land until it is exhausted, and then move to new areas. In contrast, rotational swiddening⁸⁸ is practiced among Karen, H'tin, and Khamu, who cultivate for a short period and then leave the land for a long fallow period before coming back to it again.⁸⁹ In the

⁸¹ *Ibid.*, s. 33.

⁸² *Royal Decree on the Reorganization and Authority of the Royal Forest Department and Department of National Parks, Wildlife, and Plant Conservation 2003*, Royal Thai Government Gazette 120:93 (30 September 2003), s. 6.

⁸³ *Wildlife Sanctuary Act 1992*, *supra* note 66, s. 37.

⁸⁴ *Ibid.*, s. 38.

⁸⁵ International Centre for Environmental Management, *Thailand National Report on Protected Areas and Development: Review of Protected Areas and Development in the Lower Mekong River Region* (Queensland, Australia: ICEM, 2003).

⁸⁶ Wanat Bhruksasri, "Government Policy: Highland Ethnic Minorities" in John McKinnon & Bernard Vienne, eds., *Hill Tribes Today: Problems in Change* (Bangkok: White Lotus - Orstom, 1989) at 10.

⁸⁷ This pattern of cultivation has a long cultivation period with a very long fallow period. For more details, see Chapter 1, section 1.2.2.

⁸⁸ This is another pattern of cultivation that has a short cultivation period with a long fallow period. For more details, see Chapter 1, section 1.2.2.

⁸⁹ Philip Dearden, "Development, the Environment and Social Differentiation in Northern Thailand" in Jonathan Rigg, ed., *Counting the Costs: Economic Growth and Environmental Change in Thailand* (Singapore: Institute of Southeast Asian Studies, 1996) 111 at 114-115.

past, swidden cultivation was held responsible for deforestation and soil erosion.⁹⁰ Conversely, this traditional cultivation method is considered less harmful than the cash crop system, because patterns of short cultivation and long fallow periods help stimulate the diversity of species, and are a practical means to produce economically viable crops, and a support for the cultural needs and practices of different forest users. Research shows that rotational swiddening by Lawa and Karen may provide better land management and diversity than reforestation.⁹¹ The problem is that there is no new land for pioneer swiddens and the follow-up period for rotational swiddens has become shortened while the population keeps growing speedily.⁹² Hence, government agencies try to encourage hill tribe communities to end swidden cultivation, while some government projects try to introduce agro-agriculture to replace this form of cultivation.⁹³

There are two modes of production practice among the hill tribes: the traditional domestic mode and the commercial mode. The traditional mode is a practice of mixed cropping. It allows the collection of food crops over a long period. Full-scale commercial farms using a monoculture system have also emerged.⁹⁴

The cultivation of cash crops, a common practice in commercial farming, was introduced at the time of opium eradication in the 1960s. The idea of the project was based on capitalist ideology, but it left out nearly half of the area population who were not traditionally cultivating opium, such as the Karen, Lua, H'tin, and Khamu. As a result, these groups have been worse off economically and have lower social status, while the other groups, the Hmong, Mien, Lahu, Lisu, and Akha, who were already wealthy because of their opium trading, gained more from subsequent development projects.⁹⁵

⁹⁰ Richard A. Crooker, "Forces of Change in the Thailand Opium Zone" (1988) 78:3 *The Geographical Review* 241.

⁹¹ Dietrich Schmidt Vogt, "Defining Degradation: The Impacts of Swidden on in Northern Thailand" (1998) 18:2 *Mountain Research and Development* 135.

⁹² F. Renaud, H.-D. Bechstedt & Udomchai Na-Nakorn, "Farming Systems and Soil-Conservation Practices in a Study Area of Northern Thailand" (1998) 18:4 *Mountain Research and Development* 345.

⁹³ David E. Thomas, Pornchai Preechapanaya & Pornwilai Saipothong, *Landscape Agroforestry in Northern Thailand: Impacts of Changing Land Use in an Upper Tributary Watershed of Montane Mainland Southeast Asia* (Chiang Mai, Northern Mountain Area Agroforestry Systems Research & Development Project, 2004); see also Highland Research and Development Institute (Public Organization) (HRDI), *Development Project in Highland* (in Thai), online: HRDI <<http://www2.hrdi.or.th/pagedevelop>>.

⁹⁴ Kesmanee, *supra* note 10 at 676-77.

⁹⁵ Philip Dearden, "Development and Biocultural Diversity in Northern Thailand" (1995) 15:4 *Applied Geography* 333.

Development agencies support cash crops and intensive agriculture, which helps highlanders to keep stable settlements.⁹⁶ When commercial farms practise monocropping, they make extensive use of chemical pesticides and fertilizers.⁹⁷ Moreover, when public pressure from conservationists and the RFD forces the hill tribe peoples to stop practising shifting cultivation, these peoples also have to face problems of land degradation and soil erosion.⁹⁸

Unfortunately, Thai society looks at hill tribes negatively, stereotyping them as drug traffickers and forest destroyers. In the 1960s, the Thai government launched a policy to combat opium cultivation, and tried to eliminate the hill tribes' cultures. It is not only negative policies against hill tribe peoples that have caused hardship; development projects have also caused problems. Hill tribe peoples have been provided with tremendous development projects. The main purpose of these projects was to eradicate opium production and communist insurgency in the 1960s and '70s, but they were not very successful in terms of poverty reduction in general. The projects' primary focus was economic: opium was replaced with high value crops.⁹⁹

Unfortunately, the hill tribes' adoption of cash crop agriculture has resulted in erosion of their subsistence-based societies, and concentration of aid projects within particular groups has created alienation from other tribes.¹⁰⁰ Social differentiation has increased and new cultural elements have been absorbed into the lifestyles of the hill tribe peoples.

Finally, concentrated cash crops damage the environment more than the traditional agriculture of the hill tribes, and this also shifts them from heterogeneity to homogenization, from subsistence to marketized farming. Another factor making problems worse is that the population is increasing while biodiversity is declining.¹⁰¹ Therefore, many of the hill tribe peoples still struggle in poverty.

To resolve the problems of forest areas in the north, the communities who rely on the forest have tried to find a way to resolve dilemmas between their livelihoods and forest

⁹⁶ *Ibid.* at 336-337.

⁹⁷ David Taylor, "Trade-Off in Thailand" (1996) 104:12 *Environmental Health Perspectives* 1286 at 1287.

⁹⁸ Renaud, Bechstedt & Na-Nakorn, *supra* note 92 at 345.

⁹⁹ Dearden, *supra* note 95 at 337.

¹⁰⁰ Renaud, Bechstedt & Na-Nakorn, *supra* note 92 at 345.

¹⁰¹ Dearden, *supra* note 89 at at 114-115.

conservation. Consequently, the communities' legal mobilization on community rights began in the 1980s with assistance from NGOs¹⁰² and scholars.¹⁰³ Meanwhile, government agencies have also been seeking a more efficient approach to preserving the forest. Examples include the Royal Projects – Ban Lek Nai Pa Yai (“small house in a big forest”) – and the National Forest Policy on People’s Participation in Forest Conservation (1997-2001).¹⁰⁴

3.3 *Constitution of 1997: Rebirth of Community Rights*

Thailand in the mid-1990s was in a civil society “mood” when the people demanded a new constitution.¹⁰⁵ The drafting process of the *Constitution of 1997* was based on nationwide public hearings¹⁰⁶ and community rights were among the many civil rights that were adopted into the “people’s constitution.”¹⁰⁷

3.3.1 The Fundamental Principle: Constitution

The civil rights movement for political reform tried to protect rights by creating a politics of the people and by creating new rights. Partly as a response to this movement, and to pressure from forest dwellers and their supporters, the *Constitution of 1997* established community rights for the traditional ethnic communities. The *Constitution* states that traditional communities have the right to participate in natural resource management and to maintain their traditional cultures:

¹⁰² Northern Development Foundation, *Three Decades of Community Forest in the Midst of Confusion in Thai Society* (in Thai) (Chiang Mai: Northern Development Foundation, 1999).

¹⁰³ Sacha Zurcher, “Public Participation in Community Forest Policy in Thailand: The Influence of Academics as Brokers” (2005) 105:1 *Geografisk Tidsskrift Danish Journal of Geography* 77.

¹⁰⁴ Office of the National Economic and Social Development Board (NESDB), 8th *National Economic and Social Development Plan (1997-2001)* (in Thai), online: NESDB <<http://www.nesdb.go.th/Default.aspx?tabid=90>>; see also Department of National Parks, Wildlife and Plant Conservation, *Policy on Watershed Management(1997-2004)* (in Thai), online: DNWP <<http://www.dnp.go.th/watershed/policy1.htm>>.

Note that the National Economic and Social Development Plan was a four-year national plan set out in 1997 for government agencies to support community rights. The current plan is the 11th plan (2012-2016)

¹⁰⁵ Andrew Harding & Peter Leyland, *The Constitutional System in Thailand: A Contextual Analysis* (Oxford: Hart, 2011) at 22. I will provide more historical social context in Chapter 6, section 6.2.1

¹⁰⁶ Borwornak Uwanno & Wayne D. Burns, “The Thai Constitution of 1997 and Process”(1998) 32 *University of British Columbia Law Review* 227.

¹⁰⁷ Boonlert Khachayutthadej & Prayut Khongmuang, eds., *Substance of the People’s Constitution* (in Thai) (Bangkok: Matichon, 1998).

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**.¹⁰⁸

According to Thai legal principles, rights guaranteed under the *Constitution* should supersede all other rights, as the *Constitution* is the highest law of the land and should be applied first. Also, because of past experience that shows lawyers and adjudicators do not apply the rights under the *Constitution* directly, a mechanism was included in the *Constitution* that protects the rights and liberties of the Thai people. First, section 27 indicates that all rights recognized by the *Constitution* shall be expressly protected and will be directly binding on the National Assembly, the Council of Ministers, the courts and other state organs in enacting, applying and interpreting the *Constitution*.¹⁰⁹

Thai state forestry law, which encompasses the *Forest Act*, *Forest Reserve Act*, *National Park Act*, and *Wildlife Sanctuary Act*, is the law that directly controls human activities in forest areas, including CFM.¹¹⁰ Since section 46 of the *Constitution of 1997* was enacted, state forestry law has not yet become consistent with community rights. However, if the forestry law is amended to allow some human activities in forest areas in recognition of CFM practice and to monitor the exercise of community rights to participate in forest conservation, this amendment can be interpreted as being “provided by law” under section 46 of the *Constitution*. Another option is to create new legislation that directly addresses community rights and explains CFM thoroughly.¹¹¹ As it stands now, some villagers who claim that they are exercising their rights to practise CFM have been arrested for forestry law violations without recognition of section 46 of the *Constitution*.¹¹²

Ironically, although Thai forestry laws are in conflict with the *Constitution*, and the *Constitution* theoretically binds the government to revise such laws, so far, these forestry laws

¹⁰⁸ *Constitution of the Kingdom of Thailand 1997*, trans. by Office of the Council of State, Royal Thai Government Gazette 55 (11 October 1997)

¹⁰⁹ *Ibid.*, s. 27.

¹¹⁰ *Forest Act 1941*, *supra* note 63; *National Forest Reserve Act 1964*, *supra* note 64; *National Park Act 1961*, *supra* note 65; and *Wildlife Sanctuary Act 1992*, *supra* note 66.

¹¹¹ Montri Rupsuan, *et al.*, *Spirit of the Constitution* (in Thai) (Bangkok: Winyuchon, 1999) at 120.

¹¹² Pichet Moalanon, “Irai-ken Cases vs. Community Rights Cases” (in Thai) (23 December 2009), online: Thai Justice Reform <<http://www.thaijusticereform.com>>.

are still preferentially applied. Although these laws should be considered unconstitutional, no one has yet challenged them in the Constitutional Court.¹¹³ Literally, section 6¹¹⁴ and section 29¹¹⁵ are the guardians of the *Constitution* but its enforcement requires applying to the Constitutional Court to have specific forestry laws declared unconstitutional.

In addition, another legal mechanism that tries to encourage people to enforce their constitutionally guaranteed rights is section 28, paragraph 2:

A person whose rights and liberties recognized by this Constitution are violated can invoke the provisions of this Constitution to bring a lawsuit or to defend himself or herself in court.¹¹⁶

This section shows an intention of the framers of the *Constitution* to try to change the Thai legal culture and the way in which it promotes constitutional rights merely as propaganda. However, in practice, this change regarding community rights has never really been implemented in Thailand.

People who live in the forest have had a long-term struggle for the right to access natural resources,¹¹⁷ since the four major Thai forest laws have acted to exclude traditional forest management from designated areas. This became the main controversial issue in the *Community Forest Bill* debate. The concepts of customary rights for the peoples who live in the forest and of democratic and public participation to protect and utilize natural resources as common property were guaranteed in the *Constitution of 1997* for the first time, and have been included in the current *Constitution of 2007*.

¹¹³ Community rights advocacy groups such as NGOs and civil rights lawyers have discussed challenging the forestry law in the Constitutional Court. However, before the *Constitution of 2007* was enacted, only certain state institutions could bring cases to the Constitutional Court, such as the Ombudsman or the Court of Justice in cases of unconstitutional legislation. Sections 212 and 257(2) respectively of the *Constitution of 2007* allow individuals and the National Human Rights Commission (NHRC) to submit an assessment regarding a provision that is inconsistent with the *Constitution*. The NHRC has already done this, but has still received no response from the Constitutional Court. The NHRC assessment is not binding.

¹¹⁴ *Constitution of 2007*, *supra* note 108, s. 6: "The Constitution is the supreme law of the State. The provisions of any laws, rules or regulations, which are contrary to or inconsistent with this Constitution, shall be unenforceable."

¹¹⁵ *Ibid.*, s. 29: "The restriction of such rights and liberties as recognised by the Constitution shall not be imposed on a person except by virtue of provision of the law specifically enacted for the purpose determined by this Constitution and only to the extent of necessity and provided that it shall not affect the essential substance of such rights and liberties."

¹¹⁶ *Ibid.*

¹¹⁷ Tim Forsyth & Andrew Walker, *Forest Guardians, Forest Destroyers: The Politics of Environmental Knowledge in Northern Thailand* (Seattle: University of Washington Press, 2008) at 50-58.

Although the Thai legal system is based on the supremacy of the *Constitution* under section 6, the Thai government still implements state forestry law rather than the *Constitution*. Both the forestry law and its implementation are unconstitutional because they deny traditional communities the right to participate in community forest management, and the right to conserve and restore their customary forest laws and traditional knowledge.¹¹⁸ Some communities have tried to enforce their community rights as constitutional rights that already exist, but the result has been the creation of allegation files by the RFD and DNWP.¹¹⁹ Therefore, the Thai legal system does not actually enforce community rights under the *Constitution*.¹²⁰

The *Constitution of 2007* maintains the spirit of the *Constitution of 1997* in both the inclusion of community rights and the constitutional mechanism to protect the rights of the people.¹²¹ Furthermore, it tries to correct the gap in the *Constitution of 1997* concerning community rights by lifting the clause that required the passing of a subordinate law. In the past, the *Constitution* required the legislature to provide detail about how to enforce such rights, such as via the provision of the *Community Forest Bill*, so that the subordinate law would

¹¹⁸ Moalanon, *supra* note 112.

¹¹⁹ *Ibid.*

¹²⁰ My thanks to Professor Judy Fudge for her comments on this issue, March 27, 2009.

¹²¹ *Constitution of the Kingdom of Thailand 2007*, trans. by International Foundation for Electoral System-Thailand and the Political Section and Public Diplomacy Office of the US Embassy-Bangkok, Royal Thai Government Gazette 124:47 (24 August 2007).

“Section 66. Persons so assembling to be a community, local community, or traditional community shall have the rights 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, environment, and biological diversity in a balanced fashion and persistently.

Section 67. The rights of a person to give to the State and communities participation in the conservation, 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 appropriately protected.

Any project or activity which may seriously affect the community in quality of the environment, natural resources, and health shall not be permitted, unless its impacts on the quality of the environment and health condition of people in the community have been studied and evaluated; and procedure on public hearing from the people and those affected, including from an independent organization, consisting of representatives from private environmental and health organizations and from higher education institutions providing studies in the environmental, natural resources, and health fields, have been obtained prior to the operation of such project or activity.

The rights of a community to sue a government agency, State agency, State enterprises, local government organization, or other State agencies which are juristic persons, to perform the duties as provided by this provision shall be protected.”

become key to directly denying enforcement of constitutional rights. Based on the concept of public law, government agencies have to use their authority within the limits of the legislation (passed with the implied consent of the people), otherwise they might interfere with the people's rights and freedoms.¹²² The people themselves have the freedom do anything that does not violate the law.¹²³ In the case of CFM, the people can use their community rights under the *Constitution* to support their practice. Following political reform and enforcement of the "people's constitution," public law advocacy scholars have tried to promote constitutionalism in Thai society.¹²⁴ However, all of this effort seems to have had no effect on the practical enforcement of forestry law. The new section 66 in the *Constitution of 2007* is similar to section 46 of the *Constitution of 1997*, but omits the phrase "as provided by law", allowing government agencies to continue enforcing their forestry laws.¹²⁵

3.3.2 Community-Based Forest Management

The issue of whether people can live in and preserve the forest in a sustainable way has long been debated in Thailand.¹²⁶ On the one hand, environmentalists believe that human activities have damaged the forest and that the state has to keep people out of the forest.¹²⁷ On the other hand, civil rights scholars believe that people can maintain the forests in which they live.¹²⁸

CFM is based on the concept of the commons, which explains how communities can regulate their members to use natural resources in sustainable ways and to protect the forest

¹²² Worapoj Wisarutpit, *Rights and Liberty in the Constitution: Limitation of Rights and Liberty* (in Thai) (Bangkok: Winyuchon, 1995).

¹²³ *Ibid.*

¹²⁴ Amorn Chantarasomboon, *Constitutionalism: Thailand Resolution* (in Thai) (Bangkok: Institute of Public Policy Studies, 1994).

¹²⁵ I will provide details on the government officers' legal consciousness in Chapter 5, section 5.1.2 and, in Chapter 6, section 6.2.2.5, I will use analogies from other constitutional cases to show how Thai legal culture affects the implementation of the *Constitution*.

¹²⁶ Northern Development Foundation, *supra* note 102.

¹²⁷ Panat Tasneeyanond, "Community Forest Bill Debate: Opposition Argument" (in Thai) (2002) 17:208 *Sarakadee Magazine*, online: Sarakadee Magazine <<http://www.sarakadee.com/feature/2002/06/vote.shtml>>.

¹²⁸ Shalardchai Ramitanon, Anan Ganjanapan & Santita Ganjanapan, *Community Forest in Thailand: Development Alternatives*, vol. 2 (in Thai), Sene Jamarik & Yos Santasombat, eds. (Bangkok: Local Development Institute, 1993).

from outside exploitation.¹²⁹ How a community manages the forest depends on many factors such as the boundaries of the community forest, whether its CFM regulations are created democratically, the size of the community compared to the forest area, and the presence or lack of self-monitoring systems and sanctions.¹³⁰ However, when a community breaks down, the state will take part in community forest conservation. Basically, in areas where communities are participating in forest conservation, CFM should already be established.

In addition to protecting against deforestation and degradation of biodiversity, there are two main reasons for introducing community-based forest management. First, there are people who live in the forest and there should be a sustainable way of managing their livelihoods while preserving biodiversity. Second, the RFD cannot maintain the forest effectively and it needs local support where the local community is capable of giving it.

In addition, without protection of their community forest management rights, forest peoples will likely end up being relocated. This, in addition to the tightening up of law enforcement by the RFD, will result in violations of their human rights, since these peoples have lived in the forest since long before the creation of the Thai state. If relocated, forest peoples will have even more difficulties in their struggle to live in the city as marginalized groups, and this will lead to other social problems. Similarly, if the RFD chooses to build a fence around forest lands, these lands will be surrounded by alienated communities. Therefore, incorporation of community forest management into Thai law is by far the best solution.

The remaining question for both government agencies and communities will be, "How can we coordinate community forest management with conventional scientific approaches to natural resource management?" Community-based forms have their own strong points such as local knowledge of an area, cultural links with biological diversity, a sense of belonging to the land which impels them to protect their resources, and a sufficient maintenance budget.¹³¹ There is a need to have conventional management for backup if local community management fails in some way – for instance, if the area is too wild and cannot be completely managed by the community.

¹²⁹ For further details, see Chapter 2, section 2.3.3.

¹³⁰ Chusak Wittayapak & Philip Dearden, "Decision-Making Arrangements in Community-Based Watershed Management in Northern Thailand" (1999) 12:7 *Society & Natural Resources* 673 at 684-687.

¹³¹ Philip Dearden, "'Dern Sai Klang': Walking the Middle Path to Conservation in Thailand" in Philip Dearden, ed., *Environmental Protection and Rural Development in Thailand: Challenges and Opportunities* (Bangkok: White Lotus, 2002) 377 at 391.

3.3.3 Background – History of the Draft Bill

Community rights for the people who live in the forest and a democracy that believes in public participation to protect and utilize natural resources as common property¹³² were guaranteed in the *Constitution of 1997* for the first time, and continue in the present under the *Constitution of 2007*.

Although Thailand's legal system is based on the supremacy of the *Constitution* under Article 6, the Thai government still tends to implement state forest laws rather than the *Constitution*. To resolve this constitutional dilemma, the community rights advocacy movement drew up a petition with over 50,000 signatures to propose a draft *Community Forest Bill* to the Parliament. It has been a long time since 1997; the draft bill was stalled in Parliament, opposed by middle-class "dark green" conservative groups and by some senators who did not believe in forest dwellers having power over community forest management. Finally, the bill was passed by the National Legislative Assembly in November 2007, but before the bill could be passed, the community rights advocacy group challenged its constitutionality in the Constitutional Court. This is because the bill dismantled the rights of many communities to participate in community forest management because it stipulated that the only communities that were allowed to participate in CFM must be located inside PAs and must have been practising CFM for at least more than 10 years before the bill would be enacted into law, i.e. before November 1997.¹³³ The bill has since been dissolved by the Constitutional Court because of quorum disqualification and the court has not yet ruled on the unconstitutionality issue.¹³⁴ Without the *Community Forest Bill*, life in the forest goes on and people try to survive and continue their movement to protect their rights to practise CFM.

3.3.4 Summary of Content of the Draft Bill

This bill was intended to legalize traditional communities' practice of community forest management inside PAs (PAs under this bill included national parks, wildlife sanctuaries, non-hunting areas, and headwater forests that should be preserved, but did mention forest reserves

¹³² Chusak Wittayapak, "Community as a Political Space for Struggle over Access to Natural Resources and Cultural Meaning" in Philip Dearden, ed., *Environmental Protection and Rural Development in Thailand Challenges and Opportunities* (Bangkok: White Lotus, 2002) at 285.

¹³³ *Community Forest Bill*, National Legislative Assembly (22 November 2008), s.25.

¹³⁴ Constitutional Court of Thailand, Bangkok (6 November 2008).

generally because forest reserves were already under the discretion of the Director General of the RFD, who alone could grant permission for using forest reserve areas). Firstly, the bill constituted the Committee on Community Forest Policy to review applications, to appeal, to regulate, and to administer the budget, and the Provincial Committees on Community Forests to operate at the provincial level and to inspect, monitor, and evaluate community forest management throughout each province. The Provincial Committees on Community Forests were given the power to approve applications for community forest settlement, and the Director General of the RFD was permitted to review the application. Secondly, applications by traditional communities inside PAs could be made only if they had been practising community forest management not less than 10 years before the bill was promulgated. Application for settlement in community forests outside PAs could be made by up to 50 persons, aged 18 or more, who had been domiciled in that place for not fewer than five years, and who showed that they could maintain sustainability in their management of the community forest.

The community forests registered in this bill were to be governed by the four major forest laws¹³⁵ unless there was a statement to the contrary in the bill. This means the forestry laws were considered to be of general application, while the *Community Forest Bill* was supposed to be an exception and to only affect the registration of CFM communities. The registered forest communities were to each have a plan for community forest management. The bill set out general rules for community forest management, such as a strict ban on the creation of timber products in community forests within PAs; non-timber product harvesting was permitted only in accordance with the community forest committee plan. However, settlement and cultivation were absolutely prohibited in community forests. Violation resulted in criminal penalties and compensation could potentially have been required for any damage caused by offenders.

The monitoring system was to operate at many levels and was to be organized by the government, the RFD, the National Committee, the Provincial Committee, the local level, and by NGOs. Forest communities that failed to follow sustainability practices were to have their community forest management status cancelled, and they would not be able to reapply if they had community forests within PAs.

¹³⁵ *Forest Act 1941, National Park Act 1961, National Forest Reserve Act 1964, Conservation and Protection of Wildlife Act 1992.*

Since the *Community Forest Bill* was discarded, forest communities have still continued to practise their CFM and to find ways to enforce their constitutional rights, as I will illustrate in the next section.

3.4 Post-2008: No Way Out or Just Set Free?

Under the *Constitution of 2007*, the community right to participate in natural resource management and to practise local traditions is open to interpretation because, currently, Thailand does not have any laws that directly apply to community rights. Actually, this could be a good opportunity to enforce the constitution directly. Now, landless farmers and indigenous peoples try to push community land title, but this has not served them as they had hoped, because the government only allows community land title outside PAs. Meanwhile, the forestry laws are still enforced, and CFM supported by the RFD continues to operate in the national forest reserves.

Parallel with the people's CFM, the RFD established the Community Forest Management Bureau and registered CFM communities in forest reserves.¹³⁶ Although CFM within forest reserves would support forest conservation, many genuine CFM communities still fall outside the application criteria because they are located or their community forest is located in a national park or wildlife sanctuary. The government has tried to reduce the tension caused by this problem by passing a cabinet resolution to delay the charging and fining of CFM practitioners by government officers from RFD and DNWP.¹³⁷

In contrast, the DNWP sent an official letter to the Office of the Attorney General concerning the use of an RFD model compensation calculation form from 2008¹³⁸ and the

¹³⁶ I will illustrate this in more detail in Chapter 5, section 5.1.4.1.

¹³⁷ *Cabinet Resolution: Resolution on Forest Trespassing in Nakhornratchasima Province* (22 April 1997), online: The Prime Minister's Office <http://www.cabinet.thaigov.go.th/cc_main21.htm>; *Cabinet Resolution: Solution on Land Conflict in Forest Areas* (30 June 1998), online: The Prime Minister's Office <http://www.cabinet.thaigov.go.th/cc_main21.htm>.

¹³⁸ Department of National Parks, Wildlife and Plant Conservation, "Civil Compensation Calculation Method of Damages Due to Forest Trespassing" (in Thai), Letter Number 0903.4/14374 (6 September 2005).

According to this letter, damages relating to forest trespassing are calculated as follows:

- | | |
|---|---------------------|
| 1. loss of fertile soil | \$132 CAD/rai/year |
| 2. loss of absorbent soil | \$20 CAD/rai/year |
| 3. loss of moisture in soil due to sunlight | \$1717 CAD/rai/year |

enforcement of civil compensation under the *Environmental Protection Act 1992*.¹³⁹ The push for civil compensation has increased tension as public prosecutors have started to comply with this model.¹⁴⁰ As a result, the community rights advocacy group has complained about this model to the DNWP, who initiated the model, and to the RFD, who applies it in forestry cases. Although DNWP researcher Dr. Pongsak Witawatchutikul from the Watershed Conservation and Management Office readjusted the model in May 2011, the calculation method is still unreliable and should not be used in litigation, as it violates community CFM rights. It is for this reason that community rights advocates are challenging this model in the so-called “Global Warming Case”, which is being heard by the Administrative Court.¹⁴¹

Meanwhile, to secure CFM rights, in 2009 the Indigenous Peoples’ Network joined the land reform movement to propose communal land title.¹⁴² NGOs and the government negotiated until, in 2010, the government agreed to establish the Office of Communal Land Title in the Office of the Permanent Secretary, the Prime Minister’s Office.¹⁴³ The principle of communal land title is to allow communities to use public land such as Crown land, state land,

4. loss of soil	\$59 CAD/rai/year
5. warming of air	\$1478 CAD/rai/year
6. decrease in rainfall	\$176 CAD/rai/year
7. direct damage to forest classified according to three forest types:	
7.1 rainforest	\$1992 CAD/rai/year
7.2 mixed forest	\$1384 CAD/rai/year
7.3 deciduous dipterocarp forest	\$606 CAD/rai/year

Average damage to forest in general (based on a mix of these three types of forest) \$1327 CAD/rai/year

Combining items 1 to 7 results in a total potential compensation of \$4877 CAD/rai/year.

Note: 1 rai = 1600 m² or 0.0016 km²

¹³⁹ *Enhancement and Conservation of National Environmental Quality Act 1992*, Royal Thai Government Gazette 109:37 (4 April 1992) 1, [*Environmental Protection Act*] s. 97: “Any person who commits an unlawful act damage to natural resources owned by the State or belonging to the public domain shall be liable to make compensation to the State representing the total value of natural resources so destroyed, lost or damaged by such as unlawful act.”

¹⁴⁰ I will explore this further in Chapter 5, section 5.2.2, in my discussion of the legal consciousness of public prosecutors, and in Chapter 6, section 6.2.2.5.

¹⁴¹ “Land Reform Network of Thailand Brings Global Warming Case to Administrative Court” (in Thai) *Bangkokbiznews* (13 September 2011).

¹⁴² “Northern Thai Indigenous People’s Network Joins Communal Land Title Movement”, *Prachatai News* (10 June 2009), online: Prachatai News <<http://prachatai.com/journal/2009/06/24618>>.

¹⁴³ Office of Communal Land Title, Office of Permanent Secretary, the Prime Minister’s Office, online: Office of Communal Land Title <<http://www.opm.go.th/Opmlnter/content/octl/>>.

forest reserves and national parks, but this land cannot be transferred or sold to others.¹⁴⁴ Communities that were established before October 30, 2007 when the communal land title policy was initiated may apply to the Office of Communal Land Title with their communities' histories and details about members and households, and their land use plans. A land use plan in a CFM case consists of the community plan for forest conservation.¹⁴⁵ Since the Office of Communal Land Title was founded, applications for communal land title have been relatively numerous: 417 communities (57,490 households with a total population of 223,618) have applied, using state lands comprising 3,318 km².¹⁴⁶

Communal land title is under the Office of the Prime Minister so that this office can direct other government agencies to follow the principles of communal land title to use the land under the authority of other ministries. In fact, the Ministry of Natural Resources and Environment opposes the idea of "giving away" forest lands, especially national parks. Lately, this has led to violence erupting in the south, which took place when national park officers with firearms took down bridges in a community that was preparing to register for communal land title.¹⁴⁷

However, the preservation of Protected Areas (PAs) is still required based on principles of environmental conservation. The designation of PAs also applies to CFM according to categories. For example, Category I refers to lands with "natural character" and without significant human habitation. This can apply to the spiritual forests that are important to CFM communities, but are not inhabited or cultivated. Category II lands, which refers to large natural areas that are designated to protect large-scale ecological processes, can be managed by communities, and Category VI, which refers to sustainable use of natural resources, can be used to classify forests utilized by CFM communities.¹⁴⁸

¹⁴⁴ *Ministerial Regulation on Providing Communal Land Title 2010*, Royal Thai Government Gazette 127: 73 (11 June 2010).

¹⁴⁵ Office of Communal Land Title, Office of Permanent Secretary, the Prime Minister's Office, *Announcement of the Office of Communal Land Title* (30 October 2010).

¹⁴⁶ Office of Communal Land Title, *supra* note 143.

¹⁴⁷ "National Park Rangers Ignored Communal Land Title" (in Thai), *Prachatai News* (7 April 2012), online nline: Prachatai News <<http://www.prachatai3.info/journal/2012/04/39996>>.

¹⁴⁸ See International Centre for Environmental Management, *Thailand National Report on Protected Areas and Development: Review of Protected Areas and Development in the Lower Mekong River Region* (Queensland, Australia: ICEM, 2003) at 58.

In every society, some places have to be kept as PAs for the interest of present and future generations.¹⁴⁹ Human activities concerning permissible and non-permissible uses of PAs are regulated. Forest management laws and environmental laws prohibit access to forest reserves. Moreover, these laws prescribe penalties for violations. However, the use and tenure of previously forested land still continues.¹⁵⁰ As well, these laws have also had the unfortunate result that the RFD relocated communities who were living on expropriated forest lands.

3.5 Chapter Conclusion

The laws concerning forest lands in Thailand are based on the concept that the land belongs to the state – essentially, the Crown land concept. In the beginning, the state did not concern itself with the forest as a resource. The Crown allowed people to occupy the land to produce food and other goods and to establish their households. Later, the idea of ownership was introduced systematically through the establishment and codification of civil law concepts from Western legal systems. At the same time, the forest became a source of state income. Thus, the state enacted laws to govern forest lands and the forest became PAs, even though people had been living in and using the forest for millennia. As society has developed, population growth and capitalist economics have been causing the land and the forest to become more “valuable”. The laws on conservation and the ecosystem have increased the role of forestry law. As a solution to balancing conservation with the needs of people living in forest areas, the law concerning people’s participation in forest conservation should be developed.

After CFM began to be formalized, communities who rely on the forest tried to find a way to legalize their community rights to participate in forest conservation. Although the *Constitution* already guarantees such rights, forestry law still dominates law enforcement. Under the positivist civil law system in Thailand, without legislation directly governing CFM, it is very difficult to get around the code laws and forestry laws. However, with the strong political will of the communities that practise CFM to establish their own regulations, legal mobilization continues. In the next chapter, I will portray the legal consciousness of selected communities regarding their CFM implementation.

¹⁴⁹: Dearden, *supra* note 131 at 383.

¹⁵⁰ Peter Vandergeest, “Constructing Thailand: Regulation, Everyday Resistance, and Citizenship” (1993) 35:1 *Comparative Studies in Society & History* 133 at 151.

CHAPTER 4 IMPLEMENTATION OF LAW CONCERNING COMMUNITY FOREST MANAGEMENT FROM FOREST PEOPLE'S PERSPECTIVES

There are many people who live in the protected areas in Thailand. Many of the villagers who live in the forest participate in forest conservation and management.¹ They rely on the fertile forest for their livelihood, hunting, harvesting mushrooms and ants' eggs for their households and to sell for extra cash, and using water from the forest ecosystem for their crops.² There are traditional villages that still have their own ways in the forest, like Mlabri;³ meanwhile, there are many villages where NGOs⁴ are involved in training and trying to promote sustainable forest conservation under the concept of community forest management (CFM). At the same time, the RFD has a policy to encourage the communities in forest reserves to participate in government CFM programs.⁵ This policy involves registration of villages hoping to join the RFD community forest program. However, there is a major exclusion, which is that villages cannot be legally located within forest conservation areas such as national parks or wildlife sanctuaries.⁶ This study focuses on CFM that is practised in these Protected Areas (PAs), because the CFM in PAs raises many questions and presents many law enforcement

¹ See Anan Ganjanapan & Mingsarn Kaosa-ard, *Evolution of Cultivation in the Forest Area: Case Study in the Upper North of Thailand* (in Thai) (Bangkok: Thailand Development Research Institute, 1995); Network of Indigenous Peoples in Thailand, *Report on the Situation of Human Rights and Fundamental Rights of Indigenous Peoples in Thailand*, Submitted to James Anaya, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples (19 January 2010), Chiang Mai, Thailand, online: Asia Indigenous Peoples Pact <<http://www.aippnet.org/pdf/Thai%20IPs%20submission%20to%20the%20Special%20Rapporteur%20010.pdf>>; International Centre for Environmental Management, *Thailand National Report on Protected Areas and Development: Review of Protected Areas and Development in the Lower Mekong River Region* (Queensland, Australia: ICEM, 2003).

² Waranoot Tungittiplakorn, *Highland Cash Crop Development and Biodiversity Conservation: The Hmong in Northern Thailand* (Ph.D. Dissertation, Department of Geography, University of Victoria, 1998) [unpublished]; Wiset Sujinpram, *Women's Movement in Public Space for Community Forest Management in Lamphun* (in Thai) (M.A. Thesis in Social Development, Chiang Mai University, 2001) [unpublished].

³ The meaning of the name "Mlabri" can be separated into two words. The first word is "Mla", meaning "human"; this is the word the tribe uses to call themselves. The second word "bri" is a suffix meaning "forest". Thereby, they have the word "Mlabri" which is usually translated "barbarian tribe" but they would like to be known as the "Mla tribe". Mla are also known as the "yellow leaf" people. Currently, the Mlabri population is declining and only a very small group remains. See online: Hill Tribe <<http://mlabri.hilltribe.org/english/>>.

⁴ For example, the NGOs that work with hill tribes and local people in northern Thailand, namely Inter Mountain Peoples Education and Culture in Thailand Association (IMPECT), Northern Farmers' Network (NFN), and Foundation for Ecological Recovery.

⁵ Community Forest Management Promotion Division, online: Government of Thailand <http://www.forest.go.th/community_extension/forestfarm17/farm/web/index.php>.

⁶ Community Forest Management Bureau, *Instruction Manual for Community Forest Management Projects* (Bangkok: Royal Forest Department, 2011) at 2.

dilemmas that are worth investigating. For example, although villagers claim their rights to participate in natural resource management, government officers and lawyers do not apply the Thai *Constitution*, which would protect villagers' community rights to participate in natural resource conservation.⁷ The RFD handles this policy under the *National Forest Reserve Act 1964*,⁸ section 19, which allows the Director General of the RFD discretion to grant people the right to maintain community forests within forest reserves.⁹ However, some villages located in conservation areas still practice CFM¹⁰ and search for protection of their legitimate rights to do so.

On the one hand, villagers who practise CFM try to have their rights to do so legitimated. Such villagers have to prove to the public that they can protect the forest while participating in the movement to legalize their CFM. When practising CFM, villagers sometimes face allegations of trespassing, or sometimes they have to confront natural resource disputes. On the other hand, the government changes its natural resource management policies from time to time, and globalization has also shaped CFM. Further, adjudicators in the Thai legal system are still reluctant to use section 66 of the *Constitution of 2007* to protect community rights, because they are only familiar with the state forestry laws that govern forest areas, while there is no specific legislation that governs CFM.

Reflecting CFM implementation, this chapter will describe the sequence of events regarding forest management in northern Thailand based on the selected case studies from three communities. As mentioned in Chapter 1 in 1.4, the methodology section, I have chosen these three communities as case studies because the communities are located in Protected Areas and are well-known for their CFM practices.¹¹ Their CFM is well-organized under local

⁷ Section 46 of the *Constitution of 1997*, later section 66 of the *Constitution of 2007*; see Chapter 3 in 3.3.1, above, for more on this topic.

⁸ *National Forest Reserve Act 1964*, Royal Thai Government Gazette 81:38 (28 April 1964) 263.

⁹ *Ibid.* s. 19: "For the purposes of control, maintenance or improvement of the Nation's Forest Reserves, the Director General has authority to order RFD officers to carry out any activity therein."

¹⁰ Md. Abdus Salam, Toshikuni Noguchi & Rachanee Pothitan, "Community Forest Management in Thailand: Current Situation and Dynamics in the Context of Sustainable Development" (2006) 31:2 *New Forests* 273 at 275.

¹¹ Green Globe Awards. *Green Globe Awards 2001* (in Thai), online: PTTPLC <<http://pttinternet.pttplc.com/greenglobe/eng/history.html>> ; National Park and Wildlife Department, "The Royal Project for Villagers in Tambon Maewin", online: Cooperation Division for the Royal Project <<http://www.dnp.go.th/rsd/project-area/north/bankunwin/>> ; National Parks and Wildlife Department, "Demonstration Farm in the Royal Project at Ban Khunte", online: Cooperation Division for the Royal Project <<http://www.dnp.go.th/rsd/project-area/north/kuntae/>>.

committees and they have brought the fertile forest back again. The main focus of this dissertation is how the people in these communities have formed their legal consciousness regarding CFM.

The first selected community, Tambon Maetha, was one of the first to propose the concept of the community forest and was an important participant during the movement to petition for a bill protecting community forest rights. The second selected community, Ban Huaieikhang, has joined the Indigenous People's Network, and has been trying to preserve the forest since the beginning of the CFM movement; members have also had to defend themselves by claiming community rights in the Provincial Court. Although the villagers from Ban Huaieikhang lost their case, they continue to practise CFM and educate Thai society about their experience in court. The third selected community, Ban Khunte, has battled over natural resource conflicts, and is also in the process of changing government policy concerning development projects. These villagers have adapted to new technologies, and use these technologies to resolve disputes in their territories. These three communities have been selected in this study as examples of legal consciousness from the villagers' point of view.

4.1 Tambon Maetha: A Case Study of a People's Movement and Their Struggle for Community Rights

The Tambon Maetha case study clearly illustrates the power of local people in protecting CFM and, in particular, in promoting the *Community Forest Bill*. The villagers had some conflict with the RFD in the past and are still confronted with the government's policy on enactment of the legislation creating Maetakhrai National Park, which has still not officially been proclaimed in the government gazette. Tambon Maetha plays a major role as a mentor to other villages who practise CFM.

The contents in this section provide a general background and history of the village, followed by a description of the beginnings of the CFM movement in the village, the village's relationship with Maetakhrai National Park, its cooperation with the local administration, and an overview of the youth in the community as the new generation of CFM practitioners. At the end of this section, I discuss lessons learned from Tambon Maetha.

4.1.1 General Background and History of Tambon Maetha

Tambon Maetha is a “Tambon” or subdistrict in Maeaon District, located in the eastern part of Chiang Mai Province. The area of Tambon Maetha is a valley, with an average elevation of 400-1,000 metres above sea level,¹² surrounded by forest areas located in the Maetha watershed, one of the sub-watershed areas in the upper part of the Mae Ping River basin.¹³ Tambon Maetha consists of seven villages: Ban Thamon, Ban Thakham, Ban Khoklang, Ban Huaisai, Ban Panot and Ban Donchai.¹⁴ The total population of Tambon Maetha is approximately 4,882 and the total number of households is 1,497.¹⁵

Tambon Maetha is located at the crossroads of Chiang Mai Province in the north, Lamphun Province in the south and the west, and Lampang Province in the east.¹⁶ Tambon Maetha covers an area of 108 square kilometres (67,500 rai), made up of 79.9 square kilometres (49,937.5 rai) of forest, 5.9 square kilometres (3,687.5 rai) of residential land and 22.2 square kilometres (13,875 rai) of agricultural land.¹⁷ The villagers mainly grow rice and baby corn. Some villagers work at the Lamphun Industrial Estate, where various companies produce electronic parts, construction materials, and fodder.¹⁸

¹² These figures result from a comparison of elevation contour lines from the Google map of Tambon Maetha and the Maetha Royal Project. See also Highland Research and Development Institute (HRDI), “Basic Information on Royal Projects” (10 June 2010), online: HRDI <<http://www2.hrdi.or.th/node/49>>.

¹³ Siri Maneewan, *Physical Relationships of the Sub-Watershed Areas in the Upper Part of Mae Ping River Basin* (in Thai) (M.Sc. Thesis in Geography, Chiang Mai University, 1989) [unpublished] at 80.

¹⁴ Tambon Maetha Community, *Basic Information about Tambon Maetha* (in Thai) (Chiang Mai: Tambon Maetha Community, 2005) [unpublished] at 5.

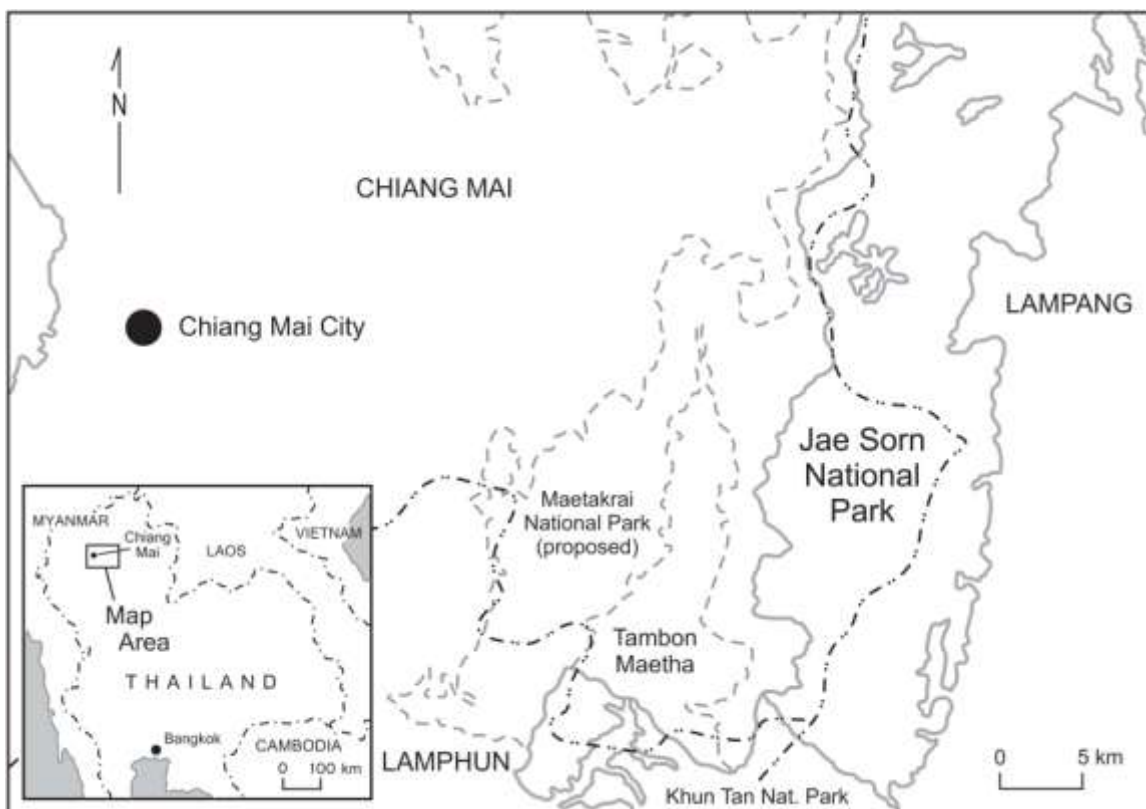
¹⁵ Tambon Maetha Community, *Sathanni Anamai Ban Huaisai and the Civil Registration of Tambon Maetha* (in Thai) (Chiang Mai: Tambon Maetha Community, 2010) [unpublished].

¹⁶ This location is significant to the history of Tambon Maetha because the villagers had to choose where they wanted to live – Lumphun, Lumpang or Chiang Mai.

¹⁷ Tambon Maetha Community, *supra* note 14 at 6.

¹⁸ Lumphun Province, online: Lumphun, Government of Thailand <<http://www.lumphun.go.th/english/index.php?mid=11>>.

Figure 4 Map of Tambon Maetha



Source: Modified from Mae Takrai National Park Map,

Department of National Parks, Wildlife, and Plant Conservation¹⁹

Community organizations in Tambon Maetha are composed of representatives from seven villages inside this subdistrict. These include the heads of the villages, chairwomen from womens' groups (*maeban*), representatives from the forestry committee, community representatives (*prachakhom*) and youth group representatives (*yowachon*).²⁰ This structure shows that the Tambon Maetha pay attention to forest management as a major part of the formal structure of their community.

This community has had a long history of multi-ethnic group settlement, beginning in 1643.²¹ Initially, there were the Lau, who moved from Cheanghuarin²² in Chiang Mai to avoid

¹⁹ Department of National Parks, Wildlife, and Plant Conservation, "Map number 9101map270109_143508 – Mae Takrai National Park," (in Thai) Database for National Park Administration, 2009.

²⁰ Tambon Maetha Community, *supra* note 14 at 10.

²¹ *Ibid.* at 6.

²² This was a place within Chiang Mai's ancient city fortress, now in Chiang Mai's downtown.

tax (*Phasi Si Baht*),²³ followed by 11 families from Chiang Saen²⁴ who took refuge from war and drought in the north. Then, nine families of Viang Lakhon²⁵ people from Khaelang Nakhon took refuge from war and settled in this area. The Karen also originally lived in this area. Later, Khamu and Tai Yong eventually moved to settle down in this community.²⁶

In the old days, with poor transportation, Tambon Maetha was, in practical terms, far away from major cities such as Chiang Mai, Lamphun, and Lampang. Tambon Maetha had self-government, but when the community became larger, the Lamphun ruler wanted them to become part of his kingdom and to pay tribute to the Lamphun. This continued until 1737, when King Rama V of Siam united the country and reformed the administration, and his regional administration put an end to the tribute system. During the early period of regional administration, Tambon Maetha chose to stay with San Khampaeng District in Chiang Mai, rather than the Pasang District in Lamphun, because they had relatives there they could stay overnight with when they had to go to a city hall meeting.²⁷ Tambon Maetha has applied the system of the village and subdistrict²⁸ as their present form of organization. After the Maetha Tambon became more decentralized, it founded the Maetha Tambon Administration Organization in December, 1999.²⁹

When the community was first formed in the late 1700s, there was a monk who migrated along with these people and founded temples in the community. The first temple was built in 1807,³⁰ and now there are five temples in Tambon Maetha.³¹ The villagers are mostly Buddhists and gather together for special religious events³² such as Buddha days, and *Wan Khaopansa*.³³

²³ Tax collected by rulers of Chiang Mai from rice production; see Sarassawadee Ongsakhun, *Lanna History*, 6th ed. (in Thai) (Bangkok: Ammarin, 2009).

²⁴ A district further north in Chiang Rai, an ancient city at the time Chiang Mai and Chiang Rai were founded.

²⁵ The former name of this people who lived in Lampang Province was the Khaelang Nakhon.

²⁶ Tambon Maetha, *History of Tambon Maetha: From the Past to the Present* (in Thai) (Chiang Mai: Tambon Maetha Community, 2004) [unpublished] at 1.

²⁷ *Ibid.* at 2.

²⁸ *Ibid.* at 1.

²⁹ Tambon Maetha Community, *supra* note 14 at 5.

³⁰ Tambon Maetha, *supra* note 26 at 7

³¹ Tambon Maetha Community, *supra* note 14 at 2

³² Tambon Maetha, *supra* note 26 at 4

³³ Buddha Day is the symbolic beginning of the rainy season. Following this, monks will stay in their temples for three months and people will go to the temples to bring monks food.

The villagers in the north also incorporate traditional Hindu and animist beliefs. For instance, these villagers participate in *Supchata*, a ceremony intended to provide blessings for long life, which is normally done on birthdays, or after unfortunate incidents occur. Many people still believe in the supernatural.³⁴

During the 1900s, the government created logging licensing, and various companies came to this community and cut down trees. The first was the Bombay Company, which logged teak trees from 1901-1908, and after that Lampang Kha Mai Company got a government concession to provide railroad ties for the national railroad enterprise, beginning in 1957.³⁵ During the logging era, the villagers asked the government to avoid granting logging licences in the Khun Huaimaebon area, where there is a creek of headwaters, which is a spiritual place where the villagers pay respect to the headwater spirit, *Phi Khunnam*.³⁶

In terms of the history of their forest before conservation, the Tambon Maetha were faced with deforestation, not only by outsiders as mentioned above, but also by the villagers themselves. After logging licensing created roads into the community, merchants introduced cash crops to the villagers. Villagers in Tambon Maetha began to make a living via agriculture and forest products,³⁷ such as mushrooms and bamboo shoots. They began to grow tobacco in forest areas for maturation tobacco factories near Maeaon District and San Khampaeng District. The villagers also used timber and made charcoal. At this point, the forest fell into a decline, which caused drought in the community.

4.1.2 Leadership and Community Forest Conservation

In 1971, a young villager named Amnart³⁸ came back to Tambon Maetha after being discharged from his military duty, and discovered there was a severe drought in his hometown. He decided to do something to bring back the forest and, thus, to restore the water. So, Amnart gathered information about what had happened in his community and tried to convince other villagers to stop cutting trees for firewood for the tobacco factories. He and the villagers complained to the government and asked them to stop the factories from using

³⁴ Tambon Maetha, *supra* note 26 at 4

³⁵ Atchara Rakyutidharm, ed., *Aeng Doi Roi Pa: Knowledge of Community of Upper Maetha Watershed in Natural Resource Management* (in Thai) (Chiang Mai: Pongsawat, 2006) at 9.

³⁶ *Ibid.* at 7

³⁷ *Ibid.* at 9.

³⁸ The real names of the interviewees in this study are not used, in order to protect confidentiality.

firewood in the area surrounding the district.³⁹ However, the situation got worse, because at that time the factories used coal, which polluted the environment more. However, the factories closed down due to the government's policy on tobacco in 1977. In the same year, Amnart became headman, *Phuyai ban*, in his home village.⁴⁰

Amnart came from a large family and his uncle and father used to be headmen of the community before him. Moreover, serving in the military gave him the experience and education to deal with difficult situations and to resolve problems; it was a stepping stone for him to take on the task of leadership and to challenge the big factories and the government's policies.⁴¹

After the tobacco factories had gone, the villagers did not have a source of income and once again started to exploit the forest. As a result, the forest suffered degradation and the drought got worse on the villagers' farm land. As a young headman, Amnart tried to convince his villagers to preserve the forest, as he thought reforestation would bring back the ecosystem: their fertile forest and water. However, his villagers asked him how they could make a living. They needed to feed their families. Amnart used logic to resolve this cyclical problem. He realized he first had to solve the problem of the villagers' poverty before he could tell them to save the forest; meanwhile, he had to show the villagers that the forest could provide resources for them and enhance their lives.⁴²

Amnart found a cash crop to introduce to the villagers; it was baby corn,⁴³ harvested based on contract farming.⁴⁴ After finding a source of income for the villagers, Amnart continued his task of promoting forest conservation. After five years, he was appointed as headman, *Kamnan*, of Tambon Maetha Subdistrict, and he expanded his forest conservation efforts to six other villages in Tambon Maetha.⁴⁵

³⁹ At that time, San Kampaeng District, where Tambon Maetha was located, had many tobacco factories.

⁴⁰ Green Globe Awards, *supra* note 11.

⁴¹ Interview with Amnart, former headman of Tambon Maetha, Mae Orn District, Chiang Mai Province (28 October 2010).

⁴² *Ibid.*

⁴³ Rakyutidharm, *supra* note 35 at 11.

⁴⁴ This system is based on futures contracts. In other words, a company sells seeds to farmers and will buy their crops after harvest for a fixed price under the contract.

⁴⁵ Green Globe Awards, *supra* note 11.

Amnart, the young headman, began setting up a forest committee in every village in Tambon Maetha Subdistrict. These committees have the duty to patrol the village forest areas to prevent illegal logging, to intercept illegal log trafficking, and also to restore the forest. According to Amnart, state law is applied to poor people strictly, but protects rich people, because enforcement is weak so that the law only affects the poor. This is no justice, Amnart believes. The only way to maintain balance in law enforcement is to have people participate in the process from the beginning, like when the villagers from Tambon Maetha took part in the movement and public hearing process to influence the drafting of the *Constitution of 1997*.⁴⁶ For this reason, Amnart does not give weight to the community land title that was “granted” by the government, because he believes it is just a policy that can change when the government changes and because it is a top-down, paternalistic idea that the government “gives” such rights to the people. The community rights that he believes in are the constitutionally protected rights which come from the people, and these “real” rights as natural law are the rights that count.

4.1.3 Tambon Maetha Community Forest Management

During the 1980s, Tambon Maetha was a “pink” zone, an area that the government labelled as requiring more national security measures due to the perceived communist threat.⁴⁷ Therefore, Tambon Maetha received more attention from government development programs. There was a project on rural development in the San Kampaeng District that focused on problems of villagers and encouraged exchange of local knowledge among villages. Along with these projects, the Tambon Maetha community set up farmers’ groups: the Rice Bank, the Savings Cooperative, and the Fertilizer Groups. Representatives from each group were sent to form a Central Committee of Maetha that was established in 1986.⁴⁸ The villagers gathered together to resolve their problems and strengthen the community by using alternative development approaches to agriculture such as organic farming and finding a market for their products, instead of employing intensive fertilizers to increase production.⁴⁹ At the same time, Non-Governmental Organizations (NGOs), represented by Khun Sawing Tanaut, came to

⁴⁶ Interview with Amnart, *supra* note 41.

⁴⁷ *Ibid.*

⁴⁸ Nikhom Chaiwan, Thanicha Thanasarn & Somkhit Tominmun, *Research Project on Factors of Expanding Sustainable Agriculture of Maetha* (in Thai) (Bangkok: Thailand Research Fund, 1999) at 4.

⁴⁹ Rakyutidharm, *supra* note 35 at 12.

Tambon Maetha to help the villagers deal with poverty.⁵⁰ They held training programs and formed the farmers' network in the northern region.

In 1991-1992, Tambon Maetha suffered a severe drought that led the villagers to realize the importance of restoring their natural resources.⁵¹ The Central Committee of Maetha convinced the villagers to participate in natural resource conservation. After the subdistrict council was settled, it played a major role in community participation regarding natural resource management.⁵² The headman of the subdistrict still had the primary responsibility of encouraging the villagers to be concerned about the environment and his allies grew in the community so that he had enough participants from seven villages to form a forest committee.

The Tambon Maetha community forest was founded in 1995-1996, when the community drew up a plan to manage their forest area by classifying the forest land in their area into three types: preserved forests, utilized forests, and agricultural and residential areas. They also enacted regulation governing forest land management and enforced them in their community.⁵³

At the beginning, the CFM committee had a difficult time convincing the villagers and the authorities, such as local administration officers and national park officers, that the new forest management regime would work, because it stood against the state power in forestry management and also against the illegal logging business.⁵⁴ At first, forest management practices did not find favour with the villagers, who wanted to continue to take forest land for farming. Therefore, the CFM committee had a tough job convincing the villagers to join forces. The headman and forest committee representatives from each village went to talk to the members of each household in each representative's community and used the social network in the community, such as women's groups, seniors' groups and youth groups, to promote the CFM concept until the villagers understood.⁵⁵ The basic concept was that they had to protect the forest and that they should use the forest and maintain it, not destroy it.

⁵⁰ Interview with Amnart, *supra* note 41.

⁵¹ *Ibid.*

⁵² Rakyutidharm, *supra* note 35 at12.

⁵³ Interview with Jamrat, community forest committee member of Tambon Maetha, Mae Orn District, Chiang Mai Province (28 October 2010).

⁵⁴ Rakyutidharm, *supra* note 35 at21.

⁵⁵ Interview with Amnart, *supra* note 41.

The concept of the people's participation in forest conservation spread throughout the northern region through the network of NGOs – the Northern Farmers' Network – which is a group of farmers who have come together to try to deal with many problems such as losing farm land, setting product prices, marketing, and farmers' debts.⁵⁶ The Northern Farmers' Network created a training program to introduce the concept of CFM to communities who live in the forest areas, encouraging them to be concerned about the environment and to preserve the forest.

Tambon Maetha first used the concept of "ordaining" trees⁵⁷ in 1996 to dedicate particular areas as community forests. The project ordained 50 million trees for the 50th anniversary of the King's coronation, and also provided forest conservation propaganda that persuaded people to respect and protect the forest areas and not cut the trees.⁵⁸ This also raised awareness among the villagers based on their own beliefs. For instance, many villagers, and Thai people generally, are very loyal to the King. The King normally gives a speech every year on his birthday asking people to preserve natural resources – and thus Thai society mostly tends to follow this advice. Therefore, ordaining trees is a way of following the King's idea of conservation. In addition, the idea of ordaining trees is an adaptation of Buddhist beliefs, which are held by many villagers. When the people ordain something or someone, the ordained object becomes a sacred object. In addition, some villagers believe that ordained objects have some supernatural powers. The supernatural is constructed through storytelling. The ceremony of ordaining the trees implies that the community has declared its commitment to respect and protect the ordained forest.

After the villagers in Tambon Maetha received ideas and support from the government and NGOs to manage their CFM, they started to organize their CFM to operate by committee. The seven villages in the Tambon Maetha Subdistrict each send two representatives to sit on this committee. Each village has its own system for choosing representatives;⁵⁹ some villages

⁵⁶ Interview with a Northern Farmers' Network representative (12 October 2010).

⁵⁷ The concept of ordaining trees originally began in the northeastern part of Thailand where monks had preserved the forest and wrapped their yellow fabric around the trees. After that, people started to use a ceremony for trees similar to the ceremony for ordaining monks. This adaptation was based on the idea that people respect monks and believe that harming them is a grave sin. Therefore, the villagers ordained trees so that the trees would not be harmed and would receive the same respect as monks, and further that the tree area would become a sacred place.

⁵⁸ Rakyutidharm, *supra* note 35 at 14.

⁵⁹ Interview with Jamrat, *supra* a note 53.

have elections, and some villages appoint members or just send the headman or his assistant to the committee. The term of the committee members depends on each village; some have a two-year term, while some stay on the committee until the headman and the villagers appoint a replacement.⁶⁰ The committee enacts regulations regarding the community's use and maintenance of the forest, and also enforces the regulations themselves.

4.1.3.1 The Community Forest Regulations

The current CFM regulations in Tambon Maetha were drafted according to the principles of the *Constitution*⁶¹ after a decade of experience and adjustment. After the Tambon Maetha CFM committee was established, members started to draft CFM regulations. The process of drafting CFM regulations is highly participatory. There are CFM committee members from each village who take issues back to their villages and consult with other villagers. The CFM committee then meets to amend the relevant regulation, and then take the amended regulation back to the villages for a public hearing before enactment.⁶² The first regulations were enacted in 1993 and amended in 1999.⁶³ In these regulations, there are rules about using timber products, forest conservation, and assistance from the community forest fund.

The first rule governs the use of timber products from the community forest. Because of the concept that villages must protect the sustainability of the forest, villagers can harvest and use some forest products with the permission of the CFM committee. For instance, a villager who needs to use wood to repair an old house can submit a request to the committee.⁶⁴ After the committee approves, the headman of the village from which the application originates will report to a meeting of the community to get approval and grant written permission to the applicant. Applicants can cut trees to use for house poles in an amount not to exceed 16 trees, and for furniture not to exceed five trees.⁶⁵ When harvesting forest products for these

⁶⁰ *Ibid.*

⁶¹ Tambon Maetha Community, *Forest Maintenance Regulation of the Community Organization of Maetha Subdistrict* (in Thai) (Chiang Mai: Tambon Maetha Community, 1999) [unpublished] [Tambon Maetha Regulations].

⁶² Rakyutidharm, *supra* note 35 at 28.

⁶³ *Ibid.* at 35.

⁶⁴ Tambon Maetha Regulations, *supra* note 61, s. 3.

⁶⁵ *Ibid.*, s. 4.

purposes, it is prohibited to use logging aids such as power saws, tractors and elephants.⁶⁶ The villagers can collect firewood from their community forest for household use only, but cannot cut fresh trees for this purpose.⁶⁷ Moreover, cutting trees for commercial purposes is definitely prohibited.⁶⁸

The second group of rules in the regulations is about maintenance of the community forest. The CFM committee tries to prevent forest fires. Traditionally, villagers burn their farm land before replanting their crops and, before the rainy season, they sometimes set small fires to stimulate mushroom growth in the soil.⁶⁹ The CFM regulations prohibit burning in public areas. Even when burning on private land, owners have to be careful to prevent the spread of fires to other people's property.⁷⁰ The regulation prohibiting people from clearing land in forest areas is also designed to prevent deforestation.⁷¹

The third set of rules creates a system to assist villagers. There are two categories of aid for villagers according to Tambon Maetha CFM. The first system has been established for cases in which villagers are arrested by the RFD or the police. This regulation applies when RFD officers arrest community members or villagers face any problems due to using timber after approval from the CFM committee.⁷² The regulations contain steps allowing for negotiation with RFD officers and consultation with village headmen. If a case cannot be settled, the headman will report to the community organization to find a solution together.⁷³

If a villager is arrested outside the community, other villagers in the same community who are aware of this incident will report it to the headman, so that the headman can ask the

⁶⁶ *Ibid.*, s. 6.

⁶⁷ *Ibid.*, s. 8.

⁶⁸ *Ibid.*, s. 9.

⁶⁹ *Announcement on the Forest Fire Situation in 2011*, Division of Forest Fire Prevention and Control, Department of National Parks, Wildlife and Plant Conservation (MNRE no. 0904.404/22232, 30 November 2010); Pirat Trakansirion, "Smoke and Forest Fires: Major Problem for Chiang Mai" (in Thai) *Chiang Mai News* (31 January 2011); Parichai Klinkhachon, "Forest Fires and Smoke" (in Thai) (1 February 2009), in Thai Society by Princess Maha Chakri Sirindhorn Anthropology Centre, online: Government of Thailand <http://downtoearthsocsc.thaigov.net/index.php?option=com_content&task=view&id=145&Itemid=8>; Ministry of Natural Resources and Environment, "The Ministry's Policy" (24 March 2010), online: Government of Thailand <<http://www.warehouse.mnre.go.th/dnn/Home/tabid/36/ctl/Details/mid/1118/ItemID/922/Default.aspx>>.

⁷⁰ Tambon Maetha Regulations, *supra* note 61, s. 10.

⁷¹ *Ibid.*

⁷² *Ibid.*, s. 12.

⁷³ *Ibid.*, s. 12.1.1.

community organization for assistance and bail out the arrested villager. In case the villager is brought before the court, the community forest committee will assist after consulting in a special meeting.⁷⁴

Another type of assistance is provided to villagers who get injured while fighting forest fires.⁷⁵ In such cases, the community forest fund will be used for medical fees and workers' compensation. In case of death, the community forest fund will help pay for the funeral.⁷⁶ The villagers know that CFM needs long-term commitment and financial support; however, they do not treat CFM in a business-oriented manner.⁷⁷ Therefore, their regulation was drafted to provide for welfare and compensation, rather than to pay for salaries for participants. In this way, they encourage people to participate in CFM because they believe in it, not for money or payment.⁷⁸

4.1.3.2 Enforcement

The Tambon Maetha CFM regulations contain sanctions against people who violate the rules prohibiting non-approved use of timber for repairing old houses. In such cases, violators will be fined and the money will go to the CFM fund.⁷⁹ Similarly, violations of rules about preventing forest fires, cutting trees for sale, and clearing forest lands will also result in fines, with the money going to the CFM fund.⁸⁰ However, the fines prescribed are low; when serious offences against the CFM rules are committed, offenders will be sent to the RFD to be criminally charged. So, another step is required when a case becomes too difficult for the CFM committee to handle.⁸¹

When the CFM committee fines a person for violating the regulations, but the violator still ignores the rules, the local administration puts pressure on the village where the violator lives. The administration imposes sanctions such as freezing the budget of the village where the violator lives, in order to get villagers to pressure the violator to respect the CFM rules and

⁷⁴ *Ibid.*, s. 12.1.2-3.

⁷⁵ *Ibid.*, s. 12.2.

⁷⁶ *Ibid.*, s. 12.3.

⁷⁷ Rakyatidharm, *supra* note 35 at 39.

⁷⁸ Interview with Jamrat, *supra* note 53.

⁷⁹ Tambon Maetha Regulations, *supra* note 61, s. 7.

⁸⁰ *Ibid.*, ss. 9-11.

⁸¹ Interview with Jamrat, *supra* note 53.

to encourage everyone to follow them.⁸² These administrative sanctions work as social sanctions that may affect the other villagers in the community. However, the villagers seem to understand that if a mechanism in their community does not work well, they have to fix that problem first. Thus, the villagers have to first correct the violators in their community and be vigilant to prevent any violation of the CFM regulations.⁸³

Enforcement is normally handled in the villages themselves through the headman and the community. Most of Tambon Maetha has effective enforcement because of their leadership.⁸⁴ However, enforcement is beyond the power of the CFM committee when the headman of a village himself violates the CFM regulations, such as when, a few years ago, a lumber businessman in a village became the headman and started logging illegally.⁸⁵ Since there was no one from his village who could act against him, the CFM committee could not do anything in his village. In this case, the CFM committee finally brought this case to attention of the RFD, who arrested the headman, who later was fired from his position. Elinor Ostrom's multi-level analysis from her work *Governing the Commons*⁸⁶ reveals that, in this situation, the relationship between formal collective choice in the village because their headman was corrupt, and the fact that the local situation was out of control, led to the CFM committee seeking support from the RFD, which is the next level of formal government agency outside the community.

In general, effective enforcement depends on the leadership promoting understanding of the regulations among the villagers; strict self-control in each village will do more than outside organization. However, if there is a corrupt leader then the committee will ask state authorities to deal with the case. Thus, villagers need to have legal awareness about CFM and must also monitor their leaders. Moreover, the government officers who work in forest conservation have to understand and be patient with the CFM protocols of the villagers. Good examples of

⁸² Rakyutidharm, *supra* note 35 at 37.

⁸³ Administrative sanctions can sometimes go too far and become abuse of power by the local administration. For example, budget allocations normally depend on the administration's discretion; so, if such a decision is explained to the public, this sanction can be allowed. However, if the decision is strictly based on law, such as granting an approval in which the law provides a clear procedure, and the administration does not follow that procedure, the administrative action is a wrongful act and can be subject to a claim in the Administrative Court.

⁸⁴ Interview with Pang, teenage girl in Tambon Maetha, Mae Orn District, Chiang Mai (26 November 2010).

⁸⁵ *Ibid.*

⁸⁶ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (New York: Cambridge University Press, 1995) at 50.

cooperation between government officers and villagers regarding CFM can be found in sections 4.3.4 and 5.1.3.1.

The most efficient way to preserve the forest area is to pay respect to the land. Normally, villagers believe that forests, especially headwater forests, are a source of water and food. There is a traditional belief that spirits protect the forest and the trees. But people are now rejecting this belief. However, CFM has helped to restore this belief among community members once again. As in times past, they conduct a yearly ceremony to pay respect to the spirit of the headwaters.⁸⁷ However, a mere ceremony is not enough for someone who does not believe in spirituality; therefore, the community uses storytelling among the members about the supernatural in the sacred forest. According to the traditional understanding, when a person goes to the sacred forest and cuts trees or kills wild animals, something bad will happen to that person. And if an example can be found that illustrates this story, the villagers will spread it in the community. This is possibly the most effective sanction for preserving the forest.⁸⁸ However, the strength of this kind of belief depends on social factors. An example of the decline in this belief is demonstrated in the case study of Ban Khunte in section 4.3.8.6.

For Jamrat, the chairperson of the Maetha Community Forest Network, law enforcement depends on the community.⁸⁹ Education is the key to passing on principles to the younger generation and building strong community. He believes that good morals in the community will help to reduce negative effects on the villagers. Jamrat has to work with people who are appointed by the Thai government in order to build their understanding about the community and enforce the law regarding CFM. Despite this involvement, he is pessimistic about the law after seeing much corruption and abuse of power by authorities, so he sees the law as an evil tool used by bad people. He states, for example, that the police often abuse their power and are corrupt. He believes that, while the law itself is evil – for example, if it is unjust – it is also used by bad people to exploit the innocent. Ordinary people try to stay away from the law unless it is absolutely necessary.⁹⁰ From Jamrat's point of view, legislation does not provide justice – people have to seek justice for themselves; thus, it depends on the community to build justice without relying on written law alone.

⁸⁷ Interview with Jamrat, *supra* note 53.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

4.1.3.3 Women's Role in CFM

Women also play a part in CFM. Occasionally, there are female representatives on CFM committees, who are selected as representatives from women's groups.⁹¹ However, the presence of women on CFM committees depends on whether there is strong support from the community to include women in the CFM decision making process. The community has chairwomen for women's groups, *mae ban*, and health care volunteers are usually women. Thus, it is not unusual to have women on community forest committees. In addition, the maintenance and use of the forest is the women's role; for instance, women collect non-timber products from the forest, like mushrooms and bamboo shoots, for household consumption, while men's roles include making forest fire breaks and dealing with violators of CFM regulations. While the Tambon Maetha CFM committee has regular monthly meetings, sometimes the committee meets more frequently when there is an important issue to discuss, such as when the national park was gazetted and its area overlapped the settlement area of the village. Frequent meetings can cause some conflicts for female committee members who also have family obligations. In addition to doing housework and providing childcare, women committee members have to spend time outside the home for CFM activities such as building forest fire barricades, and reviewing applications from CFM members about using timber products for household usage. Therefore, committee duties can be a barrier for the housewife if her family does not give her their full support.⁹²

Some committee members think that their duties include checking wood measurements against harvesting approvals, and that women might not be familiar with this kind of work; also, some committee members are concerned about whether women will be able to patrol the forest and put out forest fires. Others question whether women can even undertake the normal committee duties of enforcement of CFM regulation, promotion of CFM, and cooperation with governmental agencies and NGO networks involved in the CFM movement.⁹³ This kind of attitude reduces opportunities for women to be on CFM committees. However, the younger generation in Tambon Maetha seems to be more open to gender equality. An example of this

⁹¹ As mentioned above, the method of selecting CFM committee members varies from village to village. Some villages have selection systems, while other villages have election systems. However, it is rare to have elected female committee members.

⁹² Interview with Manee, former female committee member of Tambon Maetha, Mae Orn District, Chiang Mai (26 November 2010).

⁹³ Rakyutidharm, *supra* note 35 at 39-40.

change is the fact that the local youth group coordinator is a young woman and she plays a key role in mobilizing activities to keep CFM alive for the next generation. This is described more fully in section 4.1.7.

For ordinary women in the community, the law is far removed from their normal lives. In their view, it is the duty of authorities, like the police, to handle the law. Women just do their work and support their families. To maintain CFM, they use non-timber products such as bamboo shoots, mushrooms, and ants' eggs from the forest for their households and, when the community has to go to the city to protest, they will follow and closely support this action until the community's request is granted.⁹⁴ This is their real-life way of enforcing the law. They know their basic constitutional rights, but when it comes to really enforcing the legal process, they view the law as being too technical, so they feel they need a specialist to help them to do such things as drafting community regulations or filing a lawsuit in court. In their minds, the first thing to do is to go to the head of the village and start the process from there.⁹⁵

4.1.4 Maetakhrai National Park: Long Fight for Cooperation

In 1993, a villager in Tambon Maetha was arrested by RFD officers for trespassing in the reserved forest area while he was looking for forest products as usual. This shocked the villagers as well as the headman, since they did not know that their forest had become a PA.⁹⁶ The *National Park Act* requires the government to announce the establishment of a national park and its territory by government decree in the Thai Royal Gazette⁹⁷ and post a copy in a public place, such as at an office of a headman of the sub-district (*kamnan*). There is no consultation requirement in the process of establishing national parks, although other laws, such as zoning laws, require public hearings before lands can be re-zoned.⁹⁸ Ironically, Amnart did not know about the creation of Maetakhrai National Park, even though he was the headman at that time.⁹⁹ When Amnart and other villagers went to the national park office to bail out the villagers who had been arrested, DNWP officers told them that this forest area had

⁹⁴ Interview with Manee, *supra* note 92.

⁹⁵ *Ibid.*

⁹⁶ Interview with Amnart, *supra* note 41.

⁹⁷ *National Park Act 1961*, Royal Thai Government Gazette 78:80 (3 October 1961) 1071/3, c.1, s.6.

⁹⁸ *City Planning and Zoning Act 1975*, Royal Thai Government Gazette 33:8 (13 February 1975), as am. by Royal Thai Government Gazette 10:1 (14 February 1992), c. 3, s.19.

⁹⁹ Rakytutidharm, *supra* note 41.

become Maetakhrai National Park in 1982.¹⁰⁰ This had been done even though the headman did not know about this in advance, as if it were a secret of the government.¹⁰¹ In fact, the decree should have been posted at the office of the *kamnan* after enactment, but this was not done. Amnart tried to find the source of the law and found the decree himself later, after he did some thorough research at the district office. This event, combined with other complaints from many villagers within the proposed Maetakhrai National territory, led to the reassessment of the Maetakhrai National Park settlement. Finally, proponents of Maetakhrai National Park halted the gazetting process and reduced the park's territory by excluding the community lands from its proposed boundaries.

According to the original controversial decree, the territory of Maetakhrai National Park was approximately 1,229.8 square kilometres (768,625 rai)¹⁰², covering from Doi Saket District, to Sri Lanna National Park in Chiang Dao District and, in the south, from Doi Saket District to San Khampaeng District to Tambon Maetha in Maeaon District.¹⁰³ In these areas, the national park included residential areas and communities where people had been settled for many years. This was despite the fact that the territory of a proposed national park must not cover private land that someone legally occupies.¹⁰⁴ The villagers were very disappointed that the forest they had lived in and tried to preserve had become untouchable for them.¹⁰⁵ In the end, they decided they would take the forest back because they had lived in this area before the government turned their land into PAs without consulting them. They thought the government's actions were unfair. Thus, they demonstrated against the creation of Maetakhrai National Park.

The villagers blocked the road to the village and did not allow DNWP officers into the forest area. Moreover, they wrote a letter of complaint to the Chiang Mai Provincial Governor

¹⁰⁰ Maetakhrai National Park was created as a park in 1982, and then, in 1988, the park was expanded into the Khun Maetha and Maeaon forests. See the National Park website, online: Department of National Parks, Government of Thailand <<http://www.dnp.go.th/parkreserve/asp/style1/default.asp?npid=3&lg=1>>.

¹⁰¹ Green Globe Awards, *supra* note 11.

¹⁰² Interview with Jamrat, *supra* note 53.

¹⁰³ MaetaKrai National Park, online: Department of National Parks, Government of Thailand <<http://www.dnp.go.th/parkreserve/asp/style1/default.asp?npid=3&lg=1>>.

¹⁰⁴ *Supra* note National Park Act 1961, c. 1, s. 6, para. 2.

¹⁰⁵ Green Globe Awards, *supra* note 11.

and started a legal process about the land dispute.¹⁰⁶ The Provincial Governor appointed a committee to resolve the matter. Finally, the DNWP withdrew the Decree of Settlement of Maetakhrai National Park and set up a committee to sort out the boundary between the villages and the forest area.¹⁰⁷

In the beginning, relationship between the villagers and the DNWP was strained. DNWP officers were not allowed into the villages. When DNWP officers arrested someone for “illegal logging”, which was CFM from the villagers’ perspective, these officers were not allowed out once the villagers knew of the incident. Sometimes, DNWP officers were injured when going into the villages because villagers occasionally threw rocks at their cars. The tension only lessened after the national park territory was re-established more sensibly, avoiding residential areas, and once DNWP officers tried to blend into the villagers’ culture.

Meatakhrai National Park is now unofficially open to the public as a recreation and forest conservation area and functions as national park in the undisputed area, but the official decree has still not been handed down. The national park encompasses an area of 513.20 square kilometres (320,750 rai)¹⁰⁸ but leaves out residential areas and communities. In an attempt to reduce the tension between DNWP officers and villagers, the officers have created projects to encourage people’s participation in forest conservation and train them in CFM. Later, the villagers operated their CFM along with the DNWP and their relationship improved. When there are violations committed by villagers or by outsiders who are not under the jurisdiction of the CFM committee, the committee will ask DNWP officers to help with the legal process.¹⁰⁹ In this way, the committee helps the DNWP to preserve the forest according to the objectives of PAs.

4.1.5 Participation in the *Community Forest Bill* Movement

Since the first National Economic and Social Plan¹¹⁰ was created in 1961, the government promoted setting up farmers’ groups in every subdistrict, along with rural development.¹¹¹

¹⁰⁶ Interview with Amnart, *supra* note 41.

¹⁰⁷ Interview with Manop, DNWP officer (25 November 2010).

¹⁰⁸ “Basic Information on Maethakrai National Park”, online: Department of National Parks, Government of Thailand <<http://www.dnp.go.th/parkreserve/asp/style1/default.asp?npid=3&lg=1>>.

¹⁰⁹ Interview with Pang, *supra* note 84; interview with Manop, *supra* note 107.

¹¹⁰ The National Economic and Social Plan is an overall national-level development plan for government social and economic policy that includes natural resource management.

When the government first set up the farmers' group in the Tambon Maetha community, the group lacked continuity and cooperation.¹¹² The villagers did not undertake any activities; they only waited for funding from the government. Meanwhile, intensive agriculture came into the community and degradation of the natural resources became a more serious problem. The farmers' group Sahapan Chaonachaorai, established in 1974, gained influence after a political incident during the student uprising on October 14, 1973.¹¹³ However, with the government coup in 1976, many radical activists fled to the jungle and anti-communist propaganda began.¹¹⁴ This put the remote community under the spotlight of government and NGOs.¹¹⁵

The Rural Development Foundation is one of the NGOs that came to Tambon Maetha in 1986. Khun Sawing Tanaut and Khun Saengwan Maniwan conducted an in-depth community study and helped to set up a villagers' group to resolve poverty resulting from farming failure.¹¹⁶ They founded the group and network, and then met with other groups, sharing their experiences and learning from each other. After the Northern Farmer's Network (NFN) was founded, the headman of the community and representatives from Tambon Maetha also became members of the organization. The NFN's main objective is to resolve farmers' problems such as debts and land conflict about PAs. The headman of Tambon Maetha was one of the main leaders who asked how the villagers could gain legitimacy to manage the forest in their community.¹¹⁷

¹¹¹ See National Economic and Social Plan Office, *The National Economic and Social Plan: The First Six-Year Plan 1961- 1966*, online: National Economic and Social Plan Office, Government of Thailand <<http://www.nesdb.go.th/Portals/o/news/plan/eng/The%20First%20National%20Economic%20and%20Social%20Development%20Plan%281961-1966%29F1.pdf>>.

¹¹² Rakyutidharm, *supra* note 35 at 22.

¹¹³ "Political Unrest in 14 October 1973" (in Thai), online: Reocities <<http://www.reocities.com/thaifreeman/14october/14oct3.html>> .

¹¹⁴ Chris Baker & Pasuk Phongpaichit, *A History of Thailand* (New York: Cambridge University Press, 2005) at 156-159.

¹¹⁵ Such groups include, for example, the Thai National Defence Volunteers (created in 1978 pursuant to the *Regulation of the Prime Minister on Thai National Defence Volunteers*); and the Village Scouts organization, which was founded in Thailand in 1971 by the Border Patrol Police using boy scout tactics to train villagers about discipline, harmony, security and self-defence, including defending national security from "communist threats".

¹¹⁶ Interview with Amnart, *supra* note 41.

¹¹⁷ Green Globe Awards, *supra* note 11.

During the 1990s, there were many studies about alternative management of the forest by villagers.¹¹⁸ This reinforced the villagers' practice of their CFM. Meanwhile, opportunities arose for the people's movement when the government announced political reform.¹¹⁹ When the *Constitution of 1997* was enacted, allowing people to propose draft bills via petition, the headman of Tambon Maetha, who was chairman of the Assembly of Northern Communities Forest Network, gathered 52,698 signatures from 1,200 villages in the north and submitted the *Community Forest Bill*. On July 5, 2000, the headman of Tambon Maetha went to the Parliament to present the draft bill to the Commission of the Parliament as the first bill drafted directly by the people.¹²⁰

After the *Community Forest Bill* was submitted to the Parliament, there were six drafts proposed by government agencies, along with the "people's" draft.¹²¹ The Parliament's committee on the *Community Forest Bill* considered all controversial issues in the Bill and merged the seven drafts together, changing the draft according to what the villagers wanted. Finally, the Bill passed the National Assembly after nearly 11 years, but civil rights groups, with the consent of the peoples' movement, brought the law to the Constitutional Court because a core value of the *Community Forest Bill*, as drafted by the people, had been distorted by the National Assembly.¹²² The villagers were relieved after *the Community Forest Bill* failed to pass because, if the law had been enacted, it would have negatively affected the villagers. Regardless of whether they had the community forest law, the villagers continued to practise their CFM.¹²³

4.1.6 Joining Forces with the Local Administration

During the decade preceding the presentation of the *Community Forest Bill* in Parliament, and until it became null and void because it was unconstitutional, Tambon Maetha continued managing their community forest and reinforcing their alliances by introducing their CFM.

¹¹⁸ Shalardchai Ramitanon, Anan Ganjanapan & Santita Ganjanapan, *Community Forest in Thailand: Development Alternatives*, vol. 2 (in Thai), Sene Jammariik & Yos Santasombat, eds. (Bangkok: Local Development Institute 1993).

¹¹⁹ See Chapter 3, section 3.3.1, above, for more on this topic.

¹²⁰ Green Globe Awards, *supra* note 11.

¹²¹ *Ibid.*

¹²² See Chapter 3, section 3.4, above, for more on this topic.

¹²³ Interview with Amnart, *supra* note 41.

Amnart eventually retired from his duty as *kamnan* and became an advisor for the youth in the community, the new generation. He has a vision that the villagers should transform their CFM into a local administrative organization in order to formalize their practice within the legal system.¹²⁴ According to Amnart, when the *Community Forest Bill* was terminated, resulting in the failure to legalize CFM at the national level, the villagers should have tried to legalize their CFM locally instead of drafting CFM regulations as part of the local administrative by-law. The former headman believes that the new generation should take CFM seriously as a part of their own future in the community, rather than going outside of the community to find jobs.¹²⁵

Sak, a young man from Tambon Maetha in his late thirties, went to Bangkok, worked hard and tried to keep up with the busy life in the big city. One day, he realized that he should go back home and work there.¹²⁶ So he came back to Tambon Maetha. In the same way that the former headman of Tambon Maetha started practising CFM, Sak worked with the community in sustainable farming, which he and his family also worked in themselves – growing rice, and raising cows. This continued until 2004 when the presidency of the Tambon Administration Organization (TAO) of Maetha expired, and Sak ran for election and won.

As a son of the former headman, Sak, the new president of Tambon Maetha TAO, inherits a legacy of community service. He focuses on the environment and health care rather than on building infrastructure as the TAO usually does. He proposed CFM regulation to the TAO, and has succeeded in getting the designated forest area acknowledged, so that CFM is part of the TAO's environmental responsibility.¹²⁷ In addition, the TAO provides resources to enhance CFM, such as mapping and classifying the forest as conservation areas, utilized areas, and agricultural and residential areas. Also, the TAO uses technology like GPRS to show the precise land use boundaries in the community so that there will be fewer disputes about trespassing in the forest area. In terms of the TAO regulations, the *Maetha* TAO is still obliged

¹²⁴ Interview with Sak, headman of Tambon Maetha, Mae Orn District, Chiang Mai Province (26 November 2010).

¹²⁵ Interview with Amnart, *supra* note 41.

¹²⁶ Interview with Sak, *supra* note 124.

¹²⁷ *Ibid.*; However, some lawyers argue that the CFM regulations are still contrary to state forestry law. See Chapter 6, section 6.1.3.2.

to follow the principles of administrative law such as setting penalties in the CFM regulation¹²⁸ – otherwise the TAO can be charged with abuse of power.

The new president of the TAO believes that CFM is part of decentralization of power to the people, giving them the responsibility to oversee their natural resources.¹²⁹ Moreover, the law that persuades people to comply should benefit the people in return. This applies to the CFM that preserves the forest, because the villagers can use the forest and keep it for their descendants. On the other hand, Sak uses his status as the TAO president to work with the RFD on its CFM training program in other villages. He, along with the TAO, cooperates with the RFD and builds better relationships between the DNWP and the villagers.

As a leader from the new generation, Sak uses the law as a tool to fulfill the community's ideals. In the beginning, the villagers tried very hard to promote their *Community Forest Bill*, but when the Bill went to Parliament, the parliamentary committee cut out the body of their dream law. The law is about people's interests, and success depends on who can speak louder. Normally, the villagers had always lost to the people from the city, who had more power and more money. Therefore, according to Sak, the villagers have to strengthen their community, and then they can have more say.¹³⁰

The young president of the TAO realizes that the continuation of CFM depends on the next generation, so he has created a youth program in the community.¹³¹ The rural development project in Sankhampaeng District supports the youth in the Tambon Maetha community.¹³² Sak applies his own experience with the youth in Tambon Maetha, creating activities that keep them in the community. At first, three teenagers joined the youth program and then membership increased to 13. They have begun to generate activities for youth in Tambon Maetha.¹³³

¹²⁸ *Tambon Assembly and Tambon Administrative Organization Act 1994*, Royal Thai Government Gazette 53 a:11 (2 December 1994), c.2, s. 71.

¹²⁹ Interview with Sak, *supra* note 124.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² The government youth project supports drug addiction prevention activities in the community. With this support, the community can run programs such as after-school athletics and computer training courses.

¹³³ Interview with Sak, *supra* note 124.

4.1.7 A New Generation

Born in Tambon Maetha, Pang is one of the youth, in her early twenties, who has grown up in a changing society. Pang joined the youth program of TAO Tambon Maetha. She went to college in downtown Chiang Mai but still comes back home with the intention of building her community.¹³⁴ The youth program in Tambon Maetha has as its main objective creating activities for teenagers that help them to want to care for their community. The hope is that this will keep the youth away from drugs. After the youth have bonded with their community, the program hopes that they will stay and participate in community development.

As a youth activist, Pang has hope for the law. The continuing program is important for raising awareness in society and creating a just community. Pang believes that law enforcement depends on the leaders in each community. If a leader is good, he will lead the village to follow the law. Pang feels that enforcement of the CFM regulations is successful in her village. In contrast, if a village has a leader who violates the regulations, then that village will be ruined. According to Pang, in such a situation, the headman would have to be removed, or an outside power would have to be called in to handle the case until the situation got back to normal.¹³⁵

Youth activities first start with interviewing and collecting local knowledge from their elderly. In this way, the youth learn about their community heritage, their CFM, and its value, along with respect for the elderly. To run the program, the youth group needs funding. The TAO, through its new president, seeks support from outside sources¹³⁶ such as the Social Investment Project (SIP),¹³⁷ the United Nations Development Programme (UNDP),¹³⁸ and the Regional Community Forestry Training Center for Asia and the Pacific (RECOFTC).¹³⁹ After receiving funds, the youth program has expanded by providing training about the Maetha

¹³⁴ Interview with Pang, *supra* note 84.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ The SIP or Social Investment Project is a government loan project for which the government borrowed money from the World Bank and UNDP after the Thai economy collapsed in 1997. The SIP operated from 1998-2001. Tambon Maetha applied for funding from SIP and received funds to manage their CFM.

¹³⁸ UNDP also supported Tambon Maetha's application for their CFM youth environmental education program.

¹³⁹ Regional Community Forestry Training Center for Asia and the Pacific, online: RECOFTC <<http://www.recoftc.org>>. *Tambon Maetha* is also part of a RECOFTC pilot project and field study for CFM.

watershed environment and community participation to the youth in seven villages. Training is provided to the youth within their own communities. Based on knowledge they collected about their CFM during the training program, the youth published a book about local ecological knowledge and their forest conservation practices.¹⁴⁰ The youth program has 10-15 teenagers from local villages as active members and works very well, based on my observation, compared to the youth programs in the other two selected communities in this study. It steadily connects seniors and the young generation in the community, helping them to maintain their CFM.

4.1.8 Lessons from Tambon Maetha

As a pioneer of CFM, Tambon Maetha provides lessons for the implementation of community rights. I do not argue that everyone in the village has an awareness that he or she should preserve the forest but, in general, the villagers of Tambon Maetha have a complete picture of acceptable CFM from the regional public, which has been influenced by the Thai public in general, especially the middle class, who play an important role in natural resource management and government. The villagers' consciousness has also been constructed by a core group of people who want CFM in their community and try very hard to build a forest conservation atmosphere. Although I cannot say that they have accomplished their final goal of restoring rich forestation, at least forest areas have been regained rather than reduced as a result of the community implementing CFM.¹⁴¹ Moreover, the villagers also encourage other communities to follow their lead, so that the forest can be restored in other areas. Thus, it is worth learning from Tambon Maetha's experiences.

The story of Tambon Maetha demonstrates both individual and community dimensions. The individual perspectives come from the in-depth study interviews about how each person plays a role in CFM, what they think about the law and how they use it. The community dimension is viewed from a broader perspective in order to see how the community builds their consciousness about conducting CFM.

¹⁴⁰ The book is *Aeng Doi Roi Pa: Knowledge of the Community of the Upper Maetha Watershed in Natural Resources Management*. See Rakyutidharm, *supra* note 35.

¹⁴¹ 10th Green Global Award, Thailand, *Green Global Award for Community Forest Management* (in Thai) (2008), online: PTTPLC <<http://pttinternet.pttplc.com/greenglobe/2551/community-04.html>>.

Lessons from Tambon Maetha can be grouped into three categories. The first is about how they began to recapture their CFM. The second is about what makes them create strong CFM. The last category is the mechanisms that they use.

4.1.8.1 Getting Started

These are people who rely on the forest ecosystem to provide water and support. One of the reasons that the villagers in Tambon Maetha built their CFM is that they faced difficulties because of deforestation. Instead of escaping from their problems, they faced and tried to overcome them by rebuilding their land. Both of the key actors who have steered Tambon Maetha's CFM have had the same experience of going home and finding their community was getting worse because of deforestation, drought, ignorance and hopelessness. This drove them to want to do something for their home community.

4.1.8.2 Factors of Success or Failure

Many communities face the same kinds of problems that Tambon Maetha has experienced, but one of the factors that helped the community fight their problems was obviously their leadership. From the beginning, the former headman, along with other pioneers like the chairperson of the Community Forest Network in Maetha watershed, tried to convince the villagers to protect the forest. They started with a few people and gradually expanded to the whole community. They set up meetings and went house to house to talk to people.

This kind of leadership is also based on kinship. In rural areas, kinship is important for disseminating community information. The former headman comes from a big family and his father and uncle used to be headmen before him. Therefore, he has some respect from the villagers. Similarly, the president of TAO is a son of the former headman, and his father's reputation helps him to succeed in his job. On the other hand, the villagers probably have high expectations of him and his work but, so far, he has not failed them. He continues to pass on CFM to the next generation and to other communities.

Leadership is also important to CFM enforcement and the promotion of legal awareness among the villagers. In each village, the key to success or failure of the CFM regulations depends on the headman and the CFM committee. In one village in Tambon Maetha, the headman was a lumber company dealer and he cut trees in violation of the regulations. This

kind of “leadership” can lead to the failure of CFM. However, the community in Tambon Maetha has support systems in place for when their internal mechanisms fail. The villagers knew about the corrupt headman in their village and they told the CFM committee and the president of TAO – Sak, who is now the key man in the CFM movement. In the end, they resolved the problem by reporting the illegal logging to the DNP, which led to the headman’s arrest and discharge from his position.

The consciousness of the villagers that they need to protect their forest is illustrated by their efforts to protect the forest from illegal logging and by their promotion of environmental concern among the community. It is a result of the vision of former headman Amnart, and of the development project that serves the basic needs of the villagers.¹⁴² When their survival depends on the forest, they have to protect their source of livelihood. In the beginning, the headman introduced growing baby corn to the villagers so that they could have a main agricultural focus. However, this cash crop also destroys the land and requires more fertilizers. The new development project reduces intense commercial farming and turns the villagers towards sustainable agriculture such as organic farming and using bio-fertilizer. The needs of people must be limited, too, otherwise greed results. Community-based regulations that result from the democratic process, as well as monitoring by community members near protected forest areas, means that the villagers are functioning as watch dogs and forest stewards.

After meeting the needs of the villagers, there must also be a process that creates understanding among the villagers. The leaders have to connect cause and effect between the forest ecosystem and the well being of the community. The main explanation for the drought that they used to face is that it comes from deforestation. Hence, the way to preserve their water supply is to protect the forest. They have to learn and realize this connection by themselves. This action reflects the collective consciousness of the villagers that the former headman tried to build.¹⁴³ Also, it represents a rural community in which villagers have come together to resolve their problems. This is different from what happens in city communities, where individuals have to fix their problems alone.

Once the villagers understand the importance of their CFM, they feel that they are part of the CFM. This is because they fully participate in the drafting process, in which the committee

¹⁴² In Tambon Maetha, the agricultural area is in the village, separate from their CFM forest, which is in the forest area. This is so that the baby corn farm and rice paddies will not take over in the forest area.

¹⁴³ See Chapter 2, section 2.1 and section 2.3.3, above, for more on this topic.

brings a draft CFM regulation to each village and the villagers can comment on it and change it. When the people participate in the law making process, they feel more involved in their law enforcement. This is an example of small-scale change on the ground.

On a larger scale, the process of promoting the *Community Forest Bill* was similar. The villagers had very high expectations for the first draft bill that they drew up and proposed by petition for the first time under the “people’s constitution”. However, after 10 years of changing and cutting back their proposal, the situation went beyond their control because it was up to the Parliament. They were disappointed with their representatives and adjudicators who substantially changed the Bill. For example, in the beginning, the people’s draft was supposed to allow communities located inside PAs to participate in forest conservation, along with the communities located outside PAs, but the draft from the RFD only allowed CFM in forest reserves.¹⁴⁴ In the end, the Bill only allowed communities located inside PAs to participate in CFM if they had lived there for more than 10 years before the Bill was to be passed.¹⁴⁵ That meant excluding the communities that were located outside PAs but participated in CFM in forests within PAs, as well as the communities that had been practising CFM after the *Constitution of 1997* was enacted, but for less than 10 years.

This is important for legal consciousness and law enforcement. The villagers create their own law and apply it according to their own rationales for living. Whether this law is the CFM regulations or the local administrative law, the main point is that they can participate. Moreover, they also enforce their own law actively as is made obvious by the healthy forest surrounding the community and by the many awards that Tambon Maetha has received.¹⁴⁶ This enforcement may come in the form of religious beliefs, social sanctions or even the DNWP. The consequences directly affect the people. In contrast, the national level is beyond their control. The villagers tried to influence the top levels of government by petitioning for the *Community Forest Bill* but, beyond that, they could not participate or control the outcome. This

¹⁴⁴ Panat Tasneeyanond, “Community Forest Bill Debate: Opposition Argument” (in Thai) (2002) 17:208 *Sarakadee Magazine*, online: Sarakadee <<http://www.sarakadee.com/feature/2002/06/vote.shtml>>; Northern Development Foundation, *Three Decades of Community Forest in the Midst of Confusion in Thai Society* (in Thai) (Chiang Mai: Northern Development Foundation, 1999).

¹⁴⁵ *Community Forest Bill*, National Legislative Assembly (22 November 2008), s. 25.

¹⁴⁶ However, as I mentioned in Chapter 1, I cannot evaluate the revival of biodiversity in the selected communities as that is not my area of expertise. Therefore, I use public acceptance to justify the communities’ performance of their CFM.

caused the villagers to lose faith in state law, because they could not participate in it as their own law, law that responds to their way of life, such as the law of the commons.

The next factor that builds legal consciousness in Tambon Maetha is opportunity from outside organizations. The community received training program education from the Thai government and NGOs projects, even though their community was in the pink zone and still far from the city. They now have funding from many organizations for their CFM and other agriculture. They also finally have cooperation from the DNWP, although they first had to deal with the conflict arising from the gazettement of the national park in their territory. Now newly-appointed DNWP officers work alongside the villagers and create participatory programs for the villagers in the surrounding national park area. While many communities have requested the same support as Tambon Maetha gets, most have not received the same answer. The feature that makes the community successful is that they know how to present themselves to the funding agencies and the public in a genuine way. They have demonstrated that when they practice their CFM the forest comes back; thus, the DNWP can trust them as forest protectors.

The last success factor is Tambon Maetha's collective action, or their community orientation. The villagers take collective action in protecting their land. CFM requires the whole community to make it happen. The community is still strong as they try to maintain their practices for the next generation. They create jobs and an environment for pleasant living inside the community. Occasionally, meetings can also be a method of communicating among the villagers, and between villagers and their leader. However, for the most part, communications between the leader and the villagers are informal.

In summary, the factors that make Tambon Maetha active in their CFM are leadership, serving the community's basic needs, understanding, participation, support from outside, and maintaining collective action. This is not a formula that can be generalized to other communities, but it is an example to other communities in terms of understanding their own unique character and legal consciousness.

4.1.8.3 Tools

Tambon Maetha uses many tools to practise their CFM. The first tool is communication. Their communication comes in many forms, starting with meeting, training, and networking. They needed to convince people to agree and comply with the new form of CFM, which was new to the villagers only two decades ago. To promote CFM, they needed to inform the

villagers. Meeting is a way of communicating so that they can exchange information. Leaders or trainers can provide information, while the villagers can present their needs and their problems. Training is learning by doing. The villagers can practise and take action in the training program, and can continue to have contact with training personnel in the future as well. Networking is also a tool they use to expand their practice to other communities. As a result, they have created alliances in their movement, which can be helpful when they need to negotiate with authorities.

In order to enforce their CFM, the leaders use religious beliefs as a tool to secure adherence to CFM regulations. Most of the population are Buddhists and some believe in the supernatural. It is their tradition to pay respect to Mother Nature. This tradition reflects a combination of the local belief in spirits and the Buddhist belief in karma. Both principles are a form of natural law in Eastern philosophy. Law enforcement that follows this tradition will be more efficient in its implementation. For example, Tambon Maetha CFM uses tree ordination and teachings about the spiritual forest to keep the headwater forest area from being logged. Also used to reduce violations of the CFM regulations are teachings that those who cut trees in the spiritual forest will receive bad karma.

Another CFM strategy in Tambon Maetha is to maintain their local knowledge by having the elderly connect with the youth. This is a workable way to connect the generations. Links between elders and youth include the connection between the former headman and the president of TAO, who has created a youth program that inspired young people to publish a book about their community. Three generations in the community – seniors such as Amnart and Jamrat, the middle generation represented by Sak and Manee, and the new generation, including Pang – have bonded with each other. This is an outstanding characteristic of Tambon Maetha that is rarely found in modern communities nowadays. As a result of all their efforts, this is the only community from the three selected cases in which the new generation maintains their CFM.

Another tool that Maetha uses is cooperation with government actors like the DNWP and the local administration, the TAO. In cases in which violations are committed by insiders, such as the headman who cut trees without applying to the CFM committee, committee members and headmen do not want to create conflict within the community, so they report the case to the DNWP, leading to the arrest of such violators. This practice shows that the villagers are aware of the existence of the DNWP and choose to use it for their benefit. But when the

situation is normal in their community, they do not want the RFD to intervene in their CFM. In this sense, they are aware that the DNWP has authority, but it is secondary to their CFM. So, they have a layer of authority in their community starting from the inside, their CFM committee – to the outside, the DNWP.

Another government organization that the villagers use is the TAO. Villagers who understand CFM represent them in the TAO, and the TAO makes regulations governing people's participation in natural resource management and use of new technology like GPRS. However, the usefulness of the TAO to Tambon Maetha depends on having representatives who support CFM. It depends on whether the villagers can send their people to the TAO executive and the assembly in order to influence the TAO in the direction of CFM. Participation in the TAO leads to greater enforcement and awareness that is based on environmental concerns and people's participation.

The last tool that Maetha uses is the law in every form. The villagers choose to use the law wisely. In everyday life, they apply natural law, such as spiritual concepts of nature. They respect nature while using natural resources. However, the use of this law has limitations, because it requires individual acknowledgement. People need to have training in CFM to understand the connection between the forest and the ecosystem, and they need to appreciate the spirituality of the forest to comply with the natural law. The second level is the local law. Villagers use the local administrative law to endorse their CFM regulations. When their *Community Forest Bill* was terminated, they made use of the TAO's natural resource management plan. Most importantly, they use the *Constitution* to support their CFM. They have faced barriers to enforcing their CFM directly as community rights under the *Constitution*. However, they still believe in and rely on the CFM regulations to claim the legitimacy of their CFM. This reaffirms the living law that they practise every day.

4.2 Ban Huaieikhang: Community Forest Management and Hypocrisy in the Thai Administration

The second case is about Ban Huaieikhang. This case focuses on the arrest of a villager who was practicing CFM. This led to a case in Provincial Court, which he finally lost. The defence lawyer tried to claim his client had a right to practise CFM that was protected by the *Constitution*. This case illustrates the conflicting roles of government agencies concerned with

community forest management and how Thai adjudicators handle CFM cases. This section provides general information about Ban Huaieikhang, their CFM, the case study, their relationship with the RFD, and strategies that villagers can use to strengthen their CFM.

The following sub-section gives the general background and history of Ban Huaieikhang and their CFM, then focuses on a 1998 case about a villager who defended himself using constitutional rights. The next sub-section describes the villagers' reaction to the government agencies in handling their CFM, and the strategy they use in maintaining their CFM. The last sub-section discusses lessons learned from Ban Huaieikhang.

4.2.1 General Background and History of Ban Huaieikhang

Ban Huaieikhang is a village in Maewin Subdistrict, Maewang District, Chiang Mai Province. The village is surrounded by high mountains that are approximately 960-1,300 metres above sea level.¹⁴⁷ The headwater areas are made up of mixed forest, with some pine forest.¹⁴⁸ Many creeks begin in this area; one is Huaieikhang, which the village is named after; it forms the Maetian River before becoming the Maewang and Maekhan Rivers.¹⁴⁹ The area of Ban Huaieikhang is approximately 15.6 km² (9,763 rai) which consists of 5.8 km² (3,625 rai) of community forest conservation area; a utilized community forestry area of 6.3 km² (3,938 rai); a rotational cultivation area of 1.6 km² (1,000 rai); a rice paddy field of 0.64 km² (400 rai); and a residential area of 0.16 km² (100 rai).¹⁵⁰

The population of Ban Huaieikhang is approximately 410 in 88 households.¹⁵¹ Most of the population are Buddhists. The ethnicity of the villagers is S'kaw Karen.¹⁵² Before the Karen, the

¹⁴⁷ I arrived at these figures by comparing elevation contour lines from the Google map of Tambon Maewin and the Tung Luang Royal Project. See Highland Research and Development Institute (HRDI), "Basic Information on Royal Projects" (10 June 2010), online: HRDI <<http://www2.hrdi.or.th/node/49>>.

¹⁴⁸ Sustainable Development Foundation (North), *Basic Information on Ban Huaieikhang* (in Thai) (Chiang Mai: Sustainable Development Foundation, 2008) [unpublished] at 3 [Sustainable Development Foundation].

¹⁴⁹ Montri Chanthawong, Pornthip Bonkrop & Kritsada Bonchai, eds., *Wang Watershed Community: The Way of Natural Resource Management in the Midst of Changes* (in Thai) (Bangkok: Foundation for Ecological Recovery, 2005) at 63.

¹⁵⁰ Sustainable Development Foundation, *supra* note 148 at 1.

¹⁵¹ *Ibid.* at 2.

¹⁵² *Ibid.* at 2; S'kow Karen or "White" Karen is one of four subgroups of the Karen tribe who live in northern and northwestern Thailand; see Tribal Research Institute, *The Hill Tribes of Thailand*, 4th ed. (Chiang Mai: Technical Service Club for Tribal Research Institute, 1998) at 13.

first settlers in Ban Huaieikhang were the Lua, but they later moved to another place.¹⁵³ Then, the Karen moved to this area and established their village.¹⁵⁴ Like other Karen people, the villagers used to move their villages around according to their practice of shifting cultivation, before they stopped moving and formally settled down in Ban Huaieikhang and became the first village in Maewin Subdistrict in 1969.¹⁵⁵

Figure 5 Map of Ban Huaieikhang



Source: Modified from Mae Wang – Ob Khan National Park Map,

¹⁵³ Sustainable Development Foundation, *supra* note 148 at 1.

¹⁵⁴ *Ibid.* at 1.

¹⁵⁵ *Ibid.*

Department of National Parks, Wildlife, and Plant Conservation¹⁵⁶

In general, the villagers have a culture of rotational cultivation. They grow rice and vegetables; some families have rice paddy fields. They rely on forest products for consumption. The Karen are self-sufficient in almost everything, such as weaving clothes, crafting tools, and raising livestock underneath their houses.¹⁵⁷

Major effects on villages in the area of the Mae Wang watershed can be categorized as belonging to five eras (this is true of other hill tribe villages). The first era started with licensing of logging by the Bombay-Burma Company in 1917 and the Borneo Company in 1941, before these became Thai companies. The second era was the era of initial government support for opium plantations. The villagers' quiet and self-sufficient life began to change in 1947 after World War II. Hmong in neighbouring villages around Doi Monya grew opium and employed the Karen from Ban Huaieikhang. This influenced the villagers to grow opium in their own village, Ban Huaieikhang.

During the third era, the Thai government created a policy against opium that affected the villagers in Ban Huaieikhang. First, they stopped growing opium. Second, the villagers received some help from development projects, from the government and from the Royal Project.¹⁵⁸ The fourth era began in 1977, when the government built the road to Ban Huaieikhang. The construction of this road was supported by the Royal Project to help villagers transport their crops to market. This also affected other hill tribe villages similarly, and was part of the Thai policy to eradicate opium by encouraging other forms of agriculture. This led to problems of natural resource degradation, because the development projects encouraged growing cash crops and using many pesticides, along with intensive cultivation.¹⁵⁹ This result is reconfirmed in the Ban Huaieikhang case.

The last era has been the era of real estate development. With the devastation of natural resources, environmental conservation became a major movement, both in the government and among the people. After the economic bust and boom, real estate development started to

¹⁵⁶ Department of National Parks, Wildlife, and Plant Conservation, "Map number 9124map270109_140340- Mae Wang & Ob Khan National Park," (in Thai) Database for National Park Administration, 2009.

¹⁵⁷ Sustainable Development Foundation, *supra* note 148 at 2.

¹⁵⁸ *Ibid.*

¹⁵⁹ See Chapter 3, section 3.2.5, above, for more information.

flow into this part of the Mae Wang watershed.¹⁶⁰ These changes also applied to the villagers in Ban Huaieikhang.

As a result of intensive farming, the villagers felt pressure from the government, who blamed hill tribes for deforestation. Some of the villagers in Ban Huaieikhan lost money on their cash crops because of the high cost of production. So they returned to their old style of cultivation.¹⁶¹ Villagers also changed their crop rotation period from seven to eight years to three to five years.¹⁶² This was in response to pressure from the RFD and conservation groups. The villagers' adaptation process also benefitted from knowledge that they received from development projects like the Royal Project. Some of the villagers began to grow fruit trees, like peach, pear and persimmon.¹⁶³ Moreover, according to my field research, the villagers also intensively grow cauliflower. The emphasis on farming can sometimes lead to excessive commercialization, as with lychee plantations in other villages; however, the Ban Huaieikhang villagers have kept it moderate so far, and are trying to preserve the headwater forest and restrict human activities in their forest areas.

During the booming of the conservation era and Thai political reform, Ban Huaieikhang joined other villages in 1993 to form a local Maewang watershed group. The villagers also held a meeting at the same time to discuss the consequences of development and found that the type of development that promotes commercial agriculture is not suitable for their subsistence livelihood and the environment. Some of the villagers volunteered to practise their traditional form of agriculture, which is less intensive and is chemical free.¹⁶⁴ During the same period, the government prepared to gazette the territory of Ob Khan National Park. Ob Khan National Park is situated on the left side of the Khan River, 30 kilometres south of Chiang Mai. It covers an area of 484 km², encompassing the districts of Hang Dong, San Pathong, Mae Wang, and

¹⁶⁰ Chanthawong, Bonkrop & Bonchai, *supra* note 149 at 48-53.

¹⁶¹ In Ban Huaieikhang, there are two methods of growing rice. One is to transplant rice seedlings to rice fields on villagers' own land. This method uses the traditional form of irrigation that takes water from the creek. Another method is rotation cultivation, used mostly by those who do not have their own land and therefore cannot use the first method.

¹⁶² Sustainable Development Foundation, *supra* note 148 at 2.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.* at 1.

Samoeng.¹⁶⁵ The villagers tried to organize a group to oppose the overlap between the national park and their cultivation area.¹⁶⁶

In 1994, northern villagers from many districts, such as Mae Wang, Samoeng, Chom Thong, Mae Chaem, Chiang Dao, Phrao, and Wieng Pa Pao set up the Network of Local People to Manage Natural Resources in the Area of Mae Wang Watershed (เครือข่ายชาวบ้านจัดการทรัพยากรธรรมชาติ ลุ่มน้ำวาง).¹⁶⁷ This network became a strong force for resolving the members' natural resource problems. In addition, the water resource and watershed management movement reinforced knowledge and made the villagers realize that they had to preserve the forest.¹⁶⁸

4.2.2 Community Forest Management

The villagers of Ban Huaieikhang are known as a pioneer conservation group because of their long-term links with other Karen villages such as Ban Nong Tao. Pati Juni Odochao, the chairman of the Indigenous Peoples' Network of Thailand, is from Ban Nong Tao. The Karen tried to improve their reputation by challenging the stigmatized image that hill tribes cause deforestation. They tried to change the public's understanding of their shifting cultivation and focus on their roles as forest guardians; in doing so, they showed that their rotational cultivation system is harmonized with nature and better for the ecosystem than reforestation.¹⁶⁹

The lives of the villagers in Ban Huaieikhang are connected with nature and they rely on forest products daily. They use herbs and plants from the forest as traditional medicine and pass on this knowledge to the next generation.¹⁷⁰ Also, they have conducted their own research to demonstrate their ecological knowledge and use of the forest.¹⁷¹

¹⁶⁵ Ob-Khan National Park, online: Chiang Mai-Chiang Rai <<http://www.chiangmai-chiangrai.com/ob-khan-national-park.html>>.

¹⁶⁶ Sustainable Development Foundation, *supra* note 148 at 1.

¹⁶⁷ *Ibid.*

¹⁶⁸ Chanthawong, Bonkrop & Bonchai, *supra* note 149 at 22.

¹⁶⁹ See Pinkaew Laungaramsri, *Redefining Nature: Karen Ecological Knowledge and the Challenge to the Modern Conservation Paradigm* (Chennai: Earthworm, 2001).

¹⁷⁰ Sustainable Development Foundation, *supra* note 148 at 3.

¹⁷¹ See Paisit Panichkun, ed., *Ban Huaieikhang and Community Forest* (in Thai) (Bangkok: Local Knowledge and Bio-Resources Management for Ministry of Sciences, Technology, and Environment, 1997).

In the Karen tradition, the villagers have divided their lands into farming areas, use areas, and conservation areas. Land in the farming areas is used to grow rice, vegetables, and fruit trees. The use areas are preserved, although villagers are allowed to use timber products from these areas with the permission of a community committee. The conservation areas are preserved for wildlife and ecosystems; normally, conservation areas would include headwaters and the spiritual forest.¹⁷²

In Ban Huaieikhan, the villagers have created their own natural resource management regulations.¹⁷³ The strictest rule is the one prohibiting anyone from damaging a tree in the conservation area; the penalty is arrest and a fine of up to 1,000 baht (around \$30 CAD)¹⁷⁴ per tree.¹⁷⁵ Another rule protecting the forest is the prohibition against setting fires in the forest conservation area. Anyone who violates this rule will be fined up to 1,000 baht per 1 rai (1,600 m²) that is damaged by fire. Rules for wildlife conservation are also taken into consideration, as there is a prohibition against hunting in the forest conservation area. The penalty for hunting big game is a fine of up to for 1,000 baht, and for hunting small animals is up to 500 baht. Violators may also be captured and sent to the police. In addition, fishing with poison or electric shock¹⁷⁶ is prohibited everywhere. The penalty for violation is a fine of up to 500 baht.¹⁷⁷

The Ban Huaieikhang rules governing their forest conservation area resemble the Thai forestry law, but are different in terms of enforcement within their village. When violators are fined, the villagers will keep the money and put it towards their community forest management. However, when villagers arrest violators in serious cases, such as those involving illegal logging with heavy machinery, villagers will call in the authorities such as the police and RFD officers.

In addition to their laws about community forest management, the villagers also have some regulations that are written down as community rules. For example, there is a prohibition against anyone selling illegal drugs (fine of 5,000 baht); a prohibition against shooting guns in

¹⁷² Sustainable Development Foundation, *supra* note 148 at 3.

¹⁷³ *Ibid.*

¹⁷⁴ The minimum wage in Chiang Mai Province is 180 baht or around \$6 CDN per day. This information comes from the Office of the Secretary of the Ministry of Labour, *Minimum Wage for 2011* (1 January 2011); the exchange rate is approximately 30 baht = \$1 CDN.

¹⁷⁵ Sustainable Development Foundation, *supra* note 148 at 3.

¹⁷⁶ "Electric shock" refers to the release of electricity into the water to kill fish in an area and then collecting the fish later. This practice is very dangerous to all creatures in the water.

¹⁷⁷ Sustainable Development Foundation, *supra* note 148 at 3.

the residential area of the village (fine of 500 baht); a prohibition against stealing (fine of 500 baht); and a prohibition against anyone destroying public assets (fine of 500 baht). The last rule is very interesting. It is a prohibition against selling their land to outsiders. If anyone violates this rule, the sanctions include a fine of up to 10,000 baht, and banishment from the village.¹⁷⁸ A few people are convicted every year.¹⁷⁹

What is first noticeable about these rules is that the amounts of the fines reflect how seriously the villagers view the prohibited actions. To illustrate, the highest fine is prescribed for selling land to outsiders, and the second highest fine is for selling drugs. Fines for cutting trees and causing forest fires vary depending on the extent of the damage caused. The amounts of the fines show that the villagers take forest conservation seriously. However, the more important issue is how these rules have been enforced.

Another issue with the community rules is comparison with the state law. Some of the actions prohibited in these rules are already prohibited by state criminal law.¹⁸⁰ However, the villagers created these rules through a local process beginning with a meeting among the villagers, and ending with consensus about all these rules, so that they have created a form of social contract within the community. They can also enforce these rules among themselves. They believe that the rules they write and enforce themselves are more real, reliable, and closer to their daily lives.

The villagers enforce their community rules through the committee members who are selected from each part of the village. Another rule concerning CFM, along with the rule that prohibits anyone from damaging trees, is the prohibition against possession of power saws, which they think of as evil tools. Because power saws can cut many trees within a short time, the villagers think that if they need trees for household use, they should cut them using simple tools that make people realize the importance and preciousness of natural resources.¹⁸¹ The state law also has a regulation about power saws in place,¹⁸² however, the villagers' rule is more strict and easier to enforce. In the past, when the villagers knew that anyone possessed a

¹⁷⁸ *Ibid.*

¹⁷⁹ Interview with Ming, former community forest committee member of Ban Huaieikhang, Mae Wang District, Chiang Mai Province (21 October 2010).

¹⁸⁰ *Penal Code*, Royal Thai Government Gazette 73:95 (15 November 1956), s 217; *National Forest Reserve Act 1964*, c. 3, s. 14.

¹⁸¹ Interview with Ming, *supra* note 179.

¹⁸² *Machine Saw Act 2002*, Royal Thai Government Gazette 119:95 a (24 September 2002).

power saw, they would tell the headman and the CFM committee, and then the headman would take the power saw and burn it in public. Although the owner of the power saw might get angry, he or she would ultimately accept this form of enforcement because it is based on the community rules that are applied to everyone. This incident only occurred once, after which there was no more evidence of chainsaw possession in the village.¹⁸³

Other than the prohibitions in their community regulations, the villagers in Ban Huaieikhang also have practices that maintain their CFM.¹⁸⁴ First, they have a protocol on forest fires that states that every household has to send one person to help when there is a forest fire. During the drought season, villagers have to make a buffer zone to prevent forest fires. Second, they had an ordination ceremony for their CFM. Third, they have funding for travel that their representatives need to undertake in connection with their CFM. This is sometimes necessary because meetings are scheduled with other members of the CFM network and movement, and also because of the new training programs that they are often invited to join, sometimes in Chiang Mai or in Bangkok. The fourth practice is using GPS technology to create maps of the village and their CFM area. So far, these maps have been very useful in preventing conflict between villagers and outsiders, such as nearby villagers and the RFD.¹⁸⁵

Although the local administration recognizes Ban Huaieikhang's CFM and acknowledges their CFM regulations, there was a case from this village shortly after the enactment of the *Constitution of 1997* in which a villager who was a member of the CFM committee was convicted of violating state forestry law even though he followed the community's CFM regulations. I will explain this case in more detail in the next section.

4.2.3 *Pati Ming*: A Pioneering Case on Constitutional Rights

This story of *Pati Ming*¹⁸⁶ is a story of community forest management and constitutional rights. "Pati" is a Karen term for "uncle" that is commonly used to respectfully address older men in Karen communities. *Pati Ming* was one of the community forest committee members in

¹⁸³ Interview with Ming, *supra* note 179.

¹⁸⁴ Sustainable Development Foundation, *supra* note 148 at 4.

¹⁸⁵ Interview with Keaw, headman of Ban Huaieikhang, Mae Wang District, Chiang Mai Province (21 October 2010)

¹⁸⁶ In order to protect his identity, his real name is not used. For confidentiality reasons, none of the real names of interviewees in this study are used.

Ban Huaieikhang. This village is well known, as its community forest management plan was accepted by the local administration (*Amphor*). The normal practice when villagers want to use the wood from their forest use area is to ask for permission from the CFM committee in their village. This process is prescribed in the Ban Huaieikhang CFM regulations that are recognized by Nai Amphor, the Head of the District at Mae Wang.

This case started when a nephew of Pati Ming needed to build a new house after his marriage. According to Karen tradition, a son has to build his own house after getting married because his wife has a different spirit from that of his mother, and thus they cannot live in the same house. For this reason, the CFM regulation allows a newly married couple to take wood from the forest use area in their community, as long as the amounts taken are reasonable. So, Pati Ming's nephew sent his request to the CFM committee to cut the wood from the community forest and the committee granted permission. He cut the trees and sawed up the logs. This action was reported to the headman and to the district office. When the nephew finished sawing lumber, he asked Pati Ming to transport the lumber to the location where he wanted to build his new house. So, Pati Ming drove his truck and took this lumber, but he was arrested by a patrol unit from the RFD and was charged with possession of lumber exceeding the legal amount under the *Forest Act*.¹⁸⁷ This incident happened in November 1998, one year after the *Constitution of 1997* was enacted.

Normally, in case likes this, if the suspect admits guilt, the RFD or the police will impose a fine and let the suspect go.¹⁸⁸ However, Pati Ming denied wrongdoing because he had followed everything in the CFM regulations and the regulations were recognized by the local district authority.¹⁸⁹ As a result, the RFD charged him and he was prosecuted in Chiang Mai Provincial Court. The RFD also seized the truck that Pati Ming used to transport the lumber, which meant he could not make a living because he used his truck on his farm. Pati Ming's case received a great deal of attention from civil rights activists and media because it was the first CFM case brought to the court after the *Constitution of 1997* was proclaimed.¹⁹⁰ As for himself, Pati Ming

¹⁸⁷ *Forest Act 1941*, Royal Thai Government Gazette 58 (15 October 1941) 1417 [*Forest Act*], ss. 48, 73, 74, and 74(b); *Penal Code*, *supra* note 179, s. 83.

¹⁸⁸ Interview with Chaowat, public prosecutor in Chiang Mai Provincial Court (15 October 2010).

¹⁸⁹ Interview with Ming, *supra* note 179.

¹⁹⁰ "The Case of the Poor Who Lost by Utilizing the Forest: Urgent Need for Amending the Forestry Law" (in Thai), *Prachatham News* (30 July 2001), online: Prachatham News <http://www.prachatham.com/detail.htm?code=n_30072001_01>; Atchara Rakyutidharm, "The Night

was out on bail of 150,000 baht (approximately \$5,000 CAD) courtesy of the Sustainable Development Foundation (North), an NGO that supports the grassroots environmental movement.¹⁹¹

Pati Ming received legal assistance from legal aid provided to hill tribes. His defence counsel was a volunteer lawyer who had helped many hill tribe people in human rights cases. There are very few lawyers working on these kinds of files compared to the number of cases.

Pati Ming's defence was that he was exercising his constitutional rights, which were guaranteed by the supreme law of the land. He presented evidence that his actions were all approved and recognized by the local administration and the CFM committee. He also provided an expert report from a law professor who studied community forest management and constitutional law, which referred to research about the traditions and conservation practices in Ban Huaieikhang. However, this expert's opinion was not mentioned in the court decision, nor was the constitutional rights claim that the defence tried to argue. In my view, there was something missing in the court decision¹⁹² that made the court ignore the constitutional rights issue.

At trial, the RFD admitted that they knew about the CFM in Ban Huaieikhang, and that they had ordained trees with the villagers and had gotten help from the villagers to build a buffer zone to prevent forest fires.¹⁹³ Moreover, RFD officer referred to the RFD's policy circular promoting people's participation in CFM, according to section 19 of the *National Forest Reserve Act 1964*.¹⁹⁴ Moreover, they admitted that the RFD also has a Community Forest Management Bureau in implementation of section 46 of the *Constitution of 1997*. However, they stated that the RFD gives more priority to orders of the Ministry of Agriculture and Cooperatives that prohibit cutting and shaping restricted trees¹⁹⁵ rather than to enforcing the *Constitution*. The RFD also showed that this agriculture ministry decree was posted in the District Office and in

before Judgement Day" (in Thai) (27 December 2002), online: Local Talk 2004 <http://www.localtalk2004.com/V2005/detail.php?file=1&code=a1_27122007_01>.

¹⁹¹ The Sustainable Development Foundation (SDF) focuses on natural resource management and cooperation with grassroots people. See online: Sustainable Development Foundation Thailand (in Thai), online: Sustainable Development Foundation <<http://www.sdfthai.org/about%20ous.html>>.

¹⁹² Provincial Court, Chiang Mai (2001) 3860/2544.

¹⁹³ Testimony of the RFD officers in this case, *ibid*.

¹⁹⁴ *National Forest Reserve Act 1964*, *supra* note 8, s. 19.

¹⁹⁵ *Decree of the Ministry of Agriculture and Cooperatives on Restricted Timber 1987*, Royal Thai Government Gazette 106:26 (14 February 1989).

the office of every headman in every sub-district, suggesting that the defendant knew about the prohibition against possessing lumber in excess of the limit.¹⁹⁶ Pati Ming denied that he knew about this restriction.

According to the rules of Thai criminal procedure, Pati Ming was simply charged with a criminal offence under the *National Forest Reserve Act*. Constitutional issues were not considered by the court because, based on the rules of procedure, the court cannot raise an issue that is not relevant to the charge.¹⁹⁷ Also the court cannot listen to evidence that is not raised in the case,¹⁹⁸ so that the judge will not be seen to have any bias. However, the constitutional issue and evidence that the defense raised in the case should have been taken into consideration, especially the violation of Pati Ming's constitutional rights. Unfortunately, the judge did not acknowledge the direct connection between Pati Ming's actions as part of CFM practice, and the protection of CFM under the *Constitution*.

Another issue in this case is hypocrisy and hypothetical practical arguments. The court should have considered the RFD's recognition of Ban Huaieikhang CFM, especially since other government agencies such as the district – Amphor – and the local administration – TAO – recognize the villagers' appropriate practice of CFM.¹⁹⁹ Ban Huaieikhang's CFM existed for a long time before Pati Ming was arrested and the RFD knew about their CFM and the villagers' network. In fact, the charge against Pati Ming was possession of lumber exceeding the legal limit. The RFD did not charge him with illegal logging. If Pati Ming had sent his request to possess the lumber to the RFD, he would not have been arrested.

Finally, the court delivered its decision that Pati Ming was guilty of illegal possession of lumber. Because of his helpfulness during the trial, the court reduced Pati Ming's sentence to half of the time prescribed in the state law; therefore, he was to be jailed for six months and his truck was to be forfeited. However, because Pati Ming had never committed a crime before, the court suspended his sentence for two years. At this point, Pati Ming was satisfied that he was set free, even though his lawyer asked him to appeal the court decision to stand up for his constitutional rights. However, he had had enough of litigation and wanted to get back to normal life. He was not sure whether he would win at the Court of Appeal and he did not want

¹⁹⁶ Testimony of the RFD officer in this case, *supra* note 191.

¹⁹⁷ The *Criminal Procedure Act* governs the conduct of adjudicators.

¹⁹⁸ The *Criminal Procedure Act* also governs the use of evidence in court

¹⁹⁹ Panichkun, *supra* note 171.

to take the risk of going to prison. However, he published the story of his case in an interview with the *Prachatham News*,²⁰⁰ as he wanted his case to be acknowledged as a fight for CFM rights and wanted to correct the missing part in the enforcement of law.²⁰¹

After the case, Pati Ming continued his role in Ban Huaieikhang as a CFM committee member and active participant in the villagers' network in the Mae Wang watershed area. At the time of his interview for this study, he was preparing himself to become the *Hekho* (spiritual leader) of Ban Huaieikhang.²⁰²

4.2.4 Relationship with the Authorities

As the case in the previous section shows, the relationship between the villagers in Ban Huaieikhang and the RFD was uneasy. However, the relationship with other government agencies such as the District Administration Office, Amphor, seemed to be better. In the *Pati Ming* case, the villagers in Ban Huaieikhang and the Mae Wang Watershed Network went to the RFD office to oppose the arrest of Pati Ming and request the RFD to release him, claiming that he had followed the CFM regulations.²⁰³ The Head of the District came to mediate. The head of Mae Wang National Forest Reserve Office was later removed.

The perspective of the villagers of Ban Huaieikhang is that they want to work with authorities who "understand" their culture and traditions and can cooperate with them to preserve the forest.²⁰⁴ Following the trial, the RFD appointed some new officers. They now come and talk to the villagers occasionally and patrol the protected areas, but do not currently have any disputes with the villagers. Meanwhile, the RFD and the villagers actively work together to protect the forest from wild fires, which continue to be a threat to the forest every dry season from February to April,²⁰⁵ and they all have the same objective in their mission together.²⁰⁶

²⁰⁰ An alternative online newspaper representing the perspective of the grassroots movement

²⁰¹ "The Need for Forestry Law Reform in Accordance with the Community Rights in the Constitution" (in Thai), *Prachatham News* (18 August 2001), online: Prachatham News <http://www.prachatham.com/detail.htm?code=n_08082001_02>.

²⁰² Interview with Ming, *supra* note 179.

²⁰³ *Ibid.*; see also the court decision referring to this incident, *supra* note 192..

²⁰⁴ Interview with Eak, male villager in Ban Huaieikhang, Mae Wang District, Chiang Mai Province (21 October 2010)

²⁰⁵ *Ibid.*

²⁰⁶ Sustainable Development Foundation, *supra* note 148.

For the other government agencies, for example the District and the TAO, Ban Huaieikhang is an active village that the government has to work with in development projects.²⁰⁷ The villagers know that they need acceptance and understanding from the government and the public to gain support for their CFM. Therefore, they use the TAO to endorse their regulation and also inform the District about their CFM movement.²⁰⁸

Ban Huaieikhang is one of the active Karen groups with Ban Nong Tao who represent themselves in the indigenous peoples' forum.²⁰⁹ Ban Huaieikhang was part of the civil rights movement during the political reform period and has been popular among NGOs and media.²¹⁰

4.2.5 Strategy for Community Forest Management

Ban Huaieikhang handles its CFM by combining cultural beliefs and new tools like human rights training and GPS technology and, in this sense, it is similar to the other two communities, Tambon Maetha and Ban Khunte. However, when I compare this village with the other villages from my case studies, I find that a strong feature of these three villages is that they take collective action. There is a small group of people within the village that uses their local knowledge adapted by the new skills that they learned from outsider advocates such as civil rights activists and NGOs.

4.2.5.1 Cultural Beliefs

An important cultural belief in this case concerns environmental conservation. As a Karen village, Ban Huaieikhang believes in respect for elders, like the *Hekho*,²¹¹ who tell the young in the village how they should behave. For example, they should carefully choose trees

²⁰⁷ Chanthawong, Bonkrop & Bonchai, *supra* note 149 at 122-123; National Park and Wildlife Department, Cooperation Division for the Royal Project, "The Royal Project for Villagers in Tambon Maewin", online: Department of National Parks, Government of Thailand <<http://www.dnp.go.th/rsd/project-area/north/bankunwin/>>.

²⁰⁸ Interview with Keaw, *supra* note 185.

²⁰⁹ "Ban Nongtao: People and Reforestation" (in Thai) (19 April 2005), online: Thai NGO <<http://www.thaingo.org/HeadnewsKan/nongtao190448.htm>>; "Indigenous People and Participation in Natural Resources Management by Community" (in Thai), *Prachatai News* (7 August 2009), online: Prachatai <<http://prachatai.com/journal/2009/08/25460>>.

²¹⁰ "Forest in Mountainous Mae Wang" (in Thai) (7 November 2006), online: Thai NGO <<http://www.thaingo.org/writer/view.php?id=211>>.

²¹¹ Each village has a *Hekho*, or spiritual leader. The new *Hekho*'s male successor will usually be a member of his family, or, if there is no family member who is suitable, the villagers will choose another respected male elder from their community. Inheritance of the *Hekho* position is carefully considered. See Laungaramsri, *supra* note 169.

when building their houses, and they should not choose a tree containing a bee hive. When an elder or *Hekho* gives directions, villagers will not question them and will just do as they have been told. One reason for this obedience is their belief in the supernatural. When they see someone violating this kind of taboo and something bad happening to that person, they will never violate such a rule.²¹² These kinds of stories become the best method of enforcement of environmental rules.

This belief works well among the villagers who live in the community and are not much exposed to the urban culture. However, the new generation in Ban Huaieikhang goes to school outside the village and is exposed to new technology. They are losing interest in their traditions and belief in the supernatural, and sometimes question the dictates of the elders.²¹³ Moreover, the new generation has been inundated by capitalism, which hardly encourages them to live simple lives. Given these new trends, the villagers need a substitute mechanism to support their cultural beliefs, such as promotion of ecological lifestyles and new environmental concepts.

4.2.5.2 New Knowledge from Globalization

The villagers in Ban Huaieikhang have survived with their CFM intact despite the changing society,²¹⁴ but they have had to adjust themselves with each wave of change. Meanwhile, they receive help from outsiders such as the Indigenous Peoples' Network and civil rights activists. They have the Mae Wang Watershed Network, and the Sustainable Development Foundation (North) and many more international organizations, such as APWLD.²¹⁵ They know that assistance from one NGO often leads to assistance from another, in a chain reaction, so they often receive training programs.

Training programs encourage work on human rights, economics, the environment, and politics. As a result of this exchange of knowledge, the people in Ban Huaieikhang are able to build their own strategy to maintain their village and also their CFM. They use tools and

²¹² Interview with Ming, *supra* note 179.

²¹³ *Ibid.*

²¹⁴ Changes have occurred as a result of commercial logging, opium, cash crops, development projects and, finally, the conservation era.

²¹⁵ This organization provides training in human rights and law for women in Asia Pacific and has their office in Chiang Mai; see Asia Pacific Women Law and Development, online: APWLD <<http://www.apwld.org/>>.

assistance from outside their community to build and protect their CFM. These tools include networking, civil rights claims, GPS technology, and cooperation.

The Mae Wang Watershed Network, formed in 1994, was one of the first tools used by the villagers in strengthening their CFM. This group showcases the harmony between ethnic groups such as the Karen and Thai and their strong cooperation in natural resource conservation. When Pati Ming was arrested, the villagers used the name of this network to protest at the office of the RFD in their area.²¹⁶ Even though their request to release Pati Ming and to remove the head officer of that RFD unit was not granted, at least they were able to capture the attention of the media and the public.

Later, the head of the unit was removed, supposedly to take a promotion somewhere else and, in the villagers' view, this removal was good for them. They do not want government officers who do not "understand" their culture.²¹⁷ Such a claim sounds alien coming from the humble villagers that they normally are. This is similar to a story that I found when I went for my interviews in Ban Huaieikhang. Normally, women in this village are very humble. Many women do not speak Thai in daily life, but they can understand and can speak a little Thai with visitors. However, when I interviewed a female villager, I realized she knows many things about her human rights and constitutional rights.²¹⁸ I saw by her T-shirt that she is one of the APWLD trainees. It is not surprising that she knows many people and she can call for help when needed. I assume from the way that the villagers react to outside pressure that they can use the knowledge that they have received from the human rights and civil rights advocate groups.

The villagers do not only learn about civil rights – they also learn from their own traditional ecological knowledge and environmental conservation. One of the leaders in Ban Huaieikhang is an active participant in environmental conservation. He tries to maintain the traditional Karen knowledge about herbs and medicinal plants.²¹⁹ At the time of my field research, there was a student from Japan who came to stay in the village for a few months to record and research the local knowledge about using herbs as medicine. This valuable traditional knowledge is recognized on the international level as well.

²¹⁶ They protested at the offices of the RFD – Forest Protection Unit 2, Bang Taum, at Mae Wang. This information comes from testimony of the RFD in the *Pati Ming* case, *supra* note 191.

²¹⁷ Interview with Eak, *supra* note 204.

²¹⁸ Interview with Norm, female villager in Ban Huaieikhang, Mae Wang District, Chiang Mai Province (21 October 2010)

²¹⁹ Interview with Keaw, *supra* note 185.

Another tool that Ban Huaieikhang uses is GPS technology, which they use to create their village maps. Ban Huaieikhang is a member of IMPECT and participates in its GPS mapping project, which maps the territory of villages and their CFM.²²⁰ The leader showed me their GPS map and treats this map as evidence of their CFM practice.²²¹ He thinks that this map helps to protect CFM by showing the precise areas that they use and how they preserve the forest areas. If someone trespasses in a forest area, the GPS map will show his or her location.

The last strategy that the villagers in Ban Huaieikhang use is cooperating with government. They know they cannot stand alone without government support for their CFM. Therefore, they use the TAO as a stepping stone to the District. They joined the Karen group network, Ban Nong Tao, and tried to prove to themselves that they could preserve the forest. After they reforested their area, they expanded the network to the watershed area and then made more alliances. After that, they tried to build their connection with the District by informing the District about their CFM regulations. Because they were able to demonstrate that they could make reforestation happen, and they are actively involved in the environmental conservation program, the District also wants to do their part to fulfill government policy on indigenous peoples and environmental concerns. However, the villagers still have to handle the RFD with its questionable support of CFM. For now, their relationship with the RFD depends on the perspectives of the head officers in this area. If they have an officer who can understand the culture of the villagers, then they can practise their CFM smoothly. This relationship between communities and government agencies is becoming “traditional” in CFM practice and could be part of the social functioning that I refer to as the “cultural constitution”.

4.2.6 Lessons from the Ban Huaieikhang Case

This case study has been focused on the *Pati Ming* lawsuit, which is unusual among CFM cases, which normally have low profiles and are hidden beneath a pile of forestry cases. Other aspects of the Ban Huaieikhang village are not much different from those in the other selected case studies. The *Pati Ming* case shows the legal consciousness of 1) the villagers; 2) government agents such as RFD officers; 3) the public prosecutor; and 4) the judge who made the decision by looking at how the case was presented. Although I am only referring to this one

²²⁰ IMPECT provides training and their staff members go to the village and help with the process. This assistance is the same in Ban Khunte as well. See the parallel section 3.3.8.2., below.

²²¹ Interview with Keaw, *supra* note 185.

case in this section it represents typical practices in the Thai legal system. However, there also some surprising cases, as I will demonstrate in Chapter 6, section 6.2.2.5.

The *Pati Ming* case raises issues that can lead to further discussion of the legal consciousness of individuals and can also show how the behaviour of legal professionals reflects Thai legal culture.

4.2.6.1 Belief in the Constitutional Rights of the Villagers

Ban Huaieikhang was one of the indigenous groups that participated²²² in the political reform that led up to the drafting of the *Constitution of 1997*, because they had practiced their CFM since 1994. When Pati Ming was arrested, he did not think he had done anything wrong and truly believed that he was following his village's CFM regulations. When he was tried in the Provincial Court, he defended himself by raising section 46 of the *Constitution*.²²³ However, when he lost, his sentence was suspended and he did not take his case to the Court of Appeal, since he was concerned his freedom might be taken away from him if he lost his appeal. Nevertheless, after his case was decided, he still had a little glimmer of hope that he could educate the public by telling his story in the media²²⁴ and raise awareness about the need to implement the *Constitution*.

4.2.6.2 The Cost of Defending Constitutional Rights

The villagers' belief in their constitutional rights came with a cost. Pati Ming's truck, his way of creating income for his family, was seized; also the time spent on the case could have been used to try to push for constitutional implementation. Further, legal aid lawyers provided to help in this kind of case need to learn new perspectives, to redefine their conventional legal concepts, and to acquire broader knowledge and professional skills.

4.2.6.3 Characterizing the Case

Prosecution procedure is important in shaping a court case. When Pati Ming was charged in the Provincial Court, the public prosecutor argued that Pati Ming had violated the *National Forest Reserve Act* by possessing lumber in excess of the legal limit. This was viewed as a simple

²²² Chanthawong, Bonkrop & Bonchai, *supra* note 149.

²²³ Interview with Ming, *supra* note 179.

²²⁴ Rakyutidharm, *supra* note 190.

criminal case, because the law prescribes criminal penalties. Therefore, the court just looked at the defendant's intention in this CFM case as if it were a general criminal case, examining whether he knew that he had committed a crime; once intention was proved, the case was complete. There was no room for constitutional rights to be raised in this case. The defence lawyer could only argue that Pati Ming did not intend to break the law and was just following the CFM regulations.

Unfortunately, databases of court decisions do not contain cases that are characterized as "CFM cases" because there is no *Community Forest Bill* or other enactment specific to CFM. Using section 46 of the *Constitution* is not enough in conventional Thai legal thinking because the legal protocol needs a statute to regulate anything in detail.²²⁵ However, under the *Constitution of 2007*, section 66, the requirement of a statutory law in order to enforce rights has been lifted. This means lawyers can apply the *Constitution* directly without referring to an additional statute. So far, no one has filed a case using section 66 of the *Constitution* directly.

Currently, in the Court of Justice, we know which cases relate to CFM only by personal acknowledgment. When a villager who practises CFM is arrested, a neighbour will tell the media and/or NGOs that support CFM in the village about the arrest. Then, the case will draw attention among CFM advocates, who will try to provide legal aid to the villagers.

There is a fine line between cooperation with the people's participation in forest conservation and responsibility to protect the forest from illegal exploitation. Otherwise, the incident may appear as regular trespassing in PAs. Therefore, NGOs as well as the RFD should function as watch dogs in order to determine who has genuinely practised CFM.

4.2.6.4 The Supreme Law of the Land

This case shows that statute trumps the *Constitution* and also demonstrates the conflict between government agencies under the community forest management regime. This situation also happens in other cases on community rights when it comes to state laws that provide authority to government agencies. For example, affected communities challenged a government pipeline project run by Petroleum Thailand (PTT), but the court ruled that the project is valid according to the PTT legislation and is not unconstitutional. In a similar mineral law case, the Constitutional Court ruled for the government and upheld the relevant legislation, ignoring the constitutional rights of the community. Even ministerial orders are enforced more

²²⁵ See Chapter 3, section 3.2, above for more details.

effectively than the *Constitution*. Moreover, the *Pati Ming* case further raises the issue of direct enforcement of the *Constitution*. The claim that the *Constitution* is the supreme law of the land does not reflect reality for people and their rights in Thai legal culture.

4.2.6.5 Government Hypocrisy about CFM

After the *Constitution of 1997* was enacted, the government tried to show that they supported local people's participation in natural resource management. In contrast, the forestry laws that conflict with the *Constitution* have never been changed. The RFD informally lets local people practise their CFM, while the RFD proclaims its policy to support CFM in its own way. Other government agencies, such as the local administration, recognize CFM because they have to accept that the villages were located in that area before it became part of PAs.

While the regulation of CFM is acknowledged by the local administration, the villagers practise their CFM. Meanwhile, the RFD also has authority over PAs, and sometimes exercises its power by arresting villagers. The RFD seems to discriminate when exercising its power, enforcing the law according to their personalities and backgrounds, although this can theoretically be justified as an exercise of discretionary power.

4.2.6.6 The Factors of Power

The villagers look at the law as a form of power. A person who knows the law has the power to protect himself or herself. On the other hand, a person who does not know the law becomes a victim.²²⁶ Also, inability to speak Thai is part of the inferiority that some villagers feel when they have to deal with outsiders.²²⁷

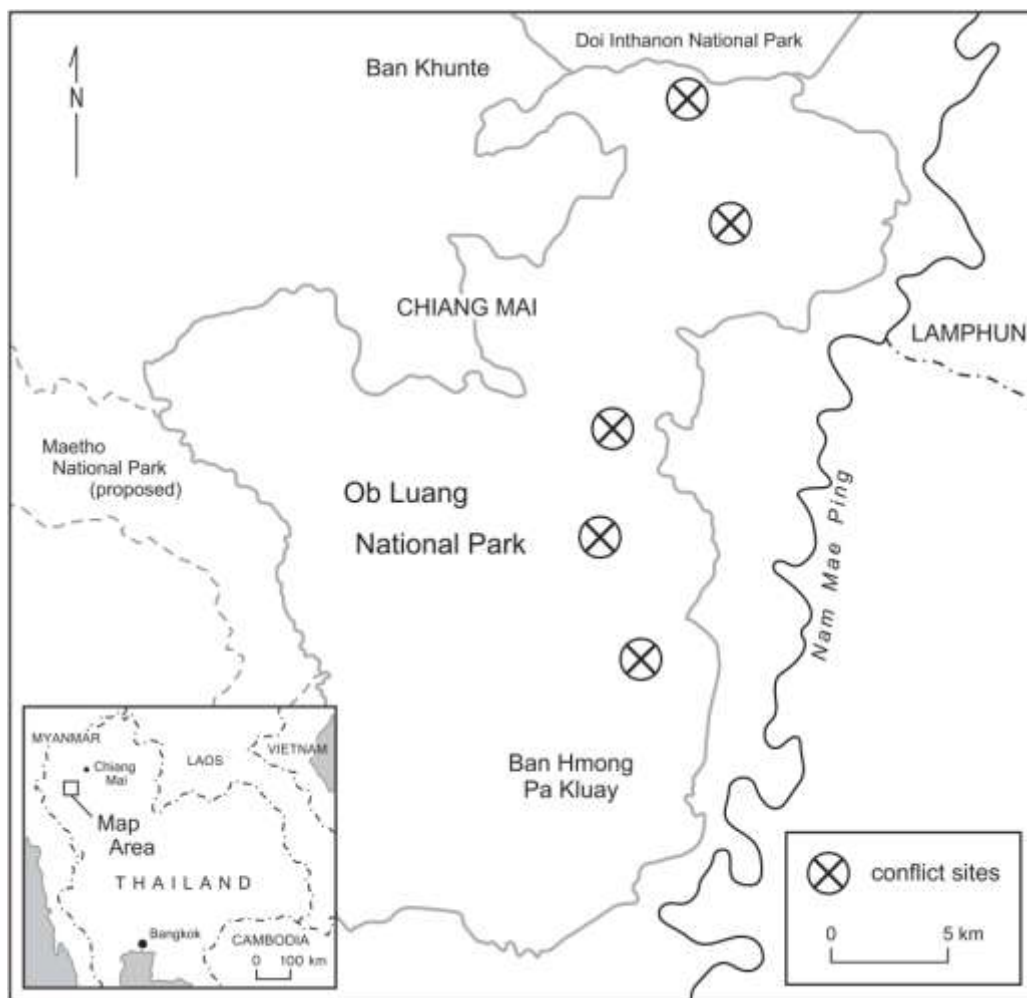
4.3 Ban Khunte: The Long Fight of Forest Dwellers

The third case concerns Ban Khunte, a Karen village that practises community forest management and has had a long fight with lowland and government agencies, and also has to be cautious of the Hmong nearby.

²²⁶ Interview with Namjai, former female community forest committee member of Ban Khunte, Jomthong District, Chiang Mai Province (2 November 2010).

²²⁷ *Ibid.*

Figure 6 Map of Ban Khunte



Source: Modified from Doi Inthanon National Park Map,

Department of National Parks, Wildlife, and Plant Conservation²²⁸

This village has had every experience, through the opium war era to the development projects of the present day.²²⁹ Although Ban Khunte seems far from practising subsistence, it represents the adaptation of community forest management for the future. For example, the villagers use technology such as GPS as a tool to protect their community forest management

²²⁸ Department of National Parks, Wildlife, and Plant Conservation, "Map number 1006map170109_83827-Doi Inthanon National Park," (in Thai) Database for National Park Administration, 2009.

²²⁹ Udom Charoeniyomphrai, Surachai Tewicharoenporn & Nittaya Mienmit, "Biodiversity and Natural Resource Management by Ethnic Minorities in the Highlands" in Rawee Tawan, Nittaya Mienmit & Rangsan Kateroot, eds., *Community Forest: The Learning Process in Participatory Natural Resource Management in Thai Society* (in Thai) (Bangkok: Domybest, 2007) 145 at 145.

rights, and to claim their rights over the land that they occupy.²³⁰ In addition, they have joined forces with landless farmers in a new movement to claim land title. This long experience of adaptation in Ban Khunte is the reason that I chose this community as the last case study.

4.3.1 General Background and History of Ban Khunte

Ban Khunte is located to the south of Chiang Mai in Doi Khaew Subdistrict, Chom Thong District, and has an average elevation of about 1,200-1,400 metres above sea level.²³¹ The village has a creek in the west called Mae Te, which provides water throughout the year.²³² The ancestors of the villagers lived in this area for more than 260 years before they settled in their current location in 1970.²³³ When the villagers first arrived in this area, they asked the King of Lanna for acknowledgement and paid tribute for a time, before they settled in this place.²³⁴

Most of the population of Ban Khunte are Karen. There are 153 households comprising 301 males and 306 females.²³⁵ Based on interviews with the villagers, Ban Khunte has steady population growth. The villagers prefer to have daughters than sons because girls are viewed as being obedient and more likely to take care of their elderly parents. In contrast, parents are afraid their sons might be involved in drugs.²³⁶ According to Ban Khunte tradition, which is similar in other villages in the north, a couple who gets married tends to stay close to the wife's family. Also, the new generation mostly comes back and stays in the village after they finish their education in the city.²³⁷ As a result of this tendency, the population in Ban Khunte is growing.

²³⁰ Due to accusations that hill tribes trespass in forest areas, the villagers have to prove that they lived on the disputed land long before it was designated as forest land by gazetting. Further, they are not permitted to expand their territory further once the land is designated as forest land. For more detail, see section 3.3.2, below.

²³¹ To arrive at these figures, I compared elevation contour lines from the Google map of Tambon Doi Khaew, and the Khun Pae Royal Project and the Huisompoi Royal Project elevation. See Highland Research and Development Institute (HRDI), "Basic Information on Royal Projects" (10 June 2010), online: HRDI <<http://www2.hrdi.or.th/node/49>>.

²³² Ban Khunte Community, *History of Ban Khunte* (in Thai) (Chiang Mai: Ban Khunte Community, 2008) [unpublished].

²³³ *Ibid.* at 1.

²³⁴ Charoenyomphrai, Tewicharoenporn & Mienmit, *supra* note 229 at 146.

²³⁵ *Ibid.* at 147.

²³⁶ Interview with Sanon, male villager in Ban Khunte, Jomthong District, Chiang Mai Province (1, 3 November 2010).

²³⁷ *Ibid.*

The majority of the villagers are Christian and the other 40% are Buddhists and Animists.²³⁸ In the beginning, the villagers were mostly Buddhist and Animist. Roman Catholics came to the village in 1963 and then, in 2003, Protestants accessed the village.²³⁹ The new religions merged with the villagers' traditions in a harmonious way. The villagers believe that God create the natural resources for them, therefore they have to be grateful and use them wisely.²⁴⁰ Meanwhile, they still practise their traditional ceremonies and believe in the spirit of the forest and the supernatural.²⁴¹

Villagers in Ban Khunte adapted themselves to change in four eras – logging, opium and national security, cash crops, and conservation and development projects. Before 1939, the villagers practised their tradition of rotation agriculture, rotating their agricultural areas for seven to 10 years before coming back to the same land. In this period, the villagers strictly believed in the supernatural and spirit of the forest, so they did not do any harm to the forest.²⁴²

From 1940-1977, the opium era, the government supported many people to grow opium, even purchasing opium directly from farmers. The forest area was reduced dramatically. The villagers became addicted to opium. Also, many outside cultures came to the highlands.²⁴³ The villagers started to have citizenship cards, and held elections for their headmen from the *déconcentration*.²⁴⁴ There was a new government system of irrigation, along with new tools for

²³⁸ *Ibid.*

²³⁹ Charoennyomphrai, Tewicharoenporn & Mienmit, *supra* note 229 at 147.

²⁴⁰ Interview with Sanon, *supra* note 236.

²⁴¹ Charoennyomphrai, Tewicharoenporn & Mienmit, *supra* note 229 at 147.

²⁴² For example, they did not cut the trees in the headwater area and spiritual forest, and did not hunt animals during the breeding season. They used the practice of casting lots (cleromancy) to choose where they would grow their crops in a given year. If they were not able to find the answer by using cleromancy, they would not grow crops that year. This information was provided in my interview with the *Hekho* of Ban Khunte.

²⁴³ Charoennyomphrai, Tewicharoenporn & Mienmit, *supra* note 229 at 148.

²⁴⁴ *Déconcentration* is an administrative system that Thailand adapted from French administrative practices and is now managed by the Thai Administrative Bureau. The Thai Administrative Bureau is divided into three branches: the central structure, which uses centralization principles; the provincial structure, which uses the *déconcentration* principle; and the local administration, which uses the decentralization principle. *Déconcentration* is a mixed principle, indicating centralization of the provincial administration in that it is accountable to the central administration, while at the same time the provincial organization is decentralized in that it is also accountable to its own authorities. The structure of *déconcentration* in the Thai Provincial Bureau consists of: province (*Changwat*), district (*Ampur*), subdistrict (*Tambon*), and villages (*Mooban*). See the *Law on Local Administration of 1914*, Royal Thai Government Gazette 31 (17 July 1914) 229; Chanchai Sawangsak, *Administrative Law* (in Thai) (Bangkok: Winyuchon, 2011).

hunting. Some of the new tools stimulated deforestation. In 1967, the national forest reserve area was gazetted, followed by the creation of Inthanon National Park in 1972.²⁴⁵

The conservation era lasted from 1977-1988. The UN financially supported stopping opium production and the Thai-Norwegian Highland Development Project was launched in 1989. The UNDP supported the hill tribes to stop using rotational cultivation by introducing new crops and strategies. The villagers received training to grow new cash crops such as coffee, cabbage, and beans. Meanwhile, the Head Water Management Unit in the DNWP employed the villagers to re-plant the forest. In this period, conflict between Hmong Ban Pa Kluai and the lowlanders erupted.²⁴⁶ The conservation group Dhammaanat Foundation for Conservation and Rural Development tried to remove the hill tribes from the forest areas, especially from headwater forests.²⁴⁷ The villagers had to change and adapt themselves to conservation concepts. Actually, they already had traditions that were harmonized with nature, but outside pressures and social changes had forced them to adapt to capitalism and increases in population.

The villagers have adapted themselves to conservation concepts and globalization. From 1989 to the present, the villagers have changed. They stopped practising rotation cultivation and accepted more cash crops. Some went to the city and became labourers. Many have been exposed to capitalism and have lost their traditional beliefs. When Ob Luang National Park was created in 1991, the national park overlapped with the village, but the villagers did not think that they could appeal this because, at that time, they still had a tradition of moving their village.²⁴⁸ However, they have not moved from their current place since.

Then, the development era came. Many real estate development projects were booming and many resorts were built south of Chiang Mai. Fruit farms and cash crops also became more popular. All of these projects required water. The environmental crisis escalated. Ban Khunte villagers had to do more to prove that they were living sustainably. Partly in response to these pressures, the villagers formed a group called Highlander Conservationists in Chom Thong

²⁴⁵ Charoenniyomphrai, Tewicharoenporn & Mienmit, *supra* note 229; *Ministerial Order on Chom Thong Forest Reserve 212 (1967)* Ministry of Agriculture and Cooperatives, Royal Thai Government Gazette 84:82 (21 August 1967).

²⁴⁶ *Ibid.* at 149.

²⁴⁷ "Dhammaanat Supports Prohibition against CFM in Headwater Area" (in Thai), *Prachatai News* (4 August 2005), online: Prachatai < <http://prachatai.com/journal/2005/08/5133> >.

²⁴⁸ Interview with the *Hekho*, Karen spiritual leader of Ban Khunte, Jomthong District, Chiang Mai Province (2 November 2010).

District. Members came from four watershed areas and 47 villages. They also participated in the drafting of the *Constitution*, especially with respect to community rights.²⁴⁹ In 2006, Joint Management of Protected Areas (JoMPA) was founded through cooperation between Ob Luang National Park, the District of Chom Thong, the TAO, NGOs, and the villagers.²⁵⁰ This project used new technology such as three-dimensional mapping and aerial photography. The villagers worked with Ob Luang National Park to survey and map the land. Finally, they succeeded in getting every sector involved in this project to approve the map, and the map became a representation of the villagers' commitment to undertake the activities set out on the map. After the map was endorsed, conflict among the villagers and their neighbours was reduced, especially the Hmong and the lowlanders. This mapping of territory in CFM forest areas has become part of the 10th National Economic and Social Development Plan (2012-2016), a national plan on environmental conservation.²⁵¹

4.3.2 Conflicts with the Lowlanders and the "Dark Green" Conservation Group

Ban Khunte survived changes throughout every era that indigenous peoples in the north of Thailand have had to face. At the beginning of the national park settlement, the villagers thought the creation of the national park, which overlapped their village, would not affect them because they had a tradition of crop rotation and they would probably move after some time. However, they have not moved since they founded their village in 1970. The village now partly overlaps with Ob Luang National Park and shares some borders with Doi Inthanon National Park.

Ban Khunte is located in a political and environmental "hot spot".²⁵² Above the village, there is a group of Hmong villagers who practise heavy commercial agriculture. Meanwhile, the surrounding areas of the foot hills support the farm lands of the local people. Over the last two

²⁴⁹ Interview with Nattawit, community forest committee member of Ban Khunte, Jomthong District, Chiang Mai Province (1 November 2010).

²⁵⁰ Charoenyomphrai, Tewicharoenporn & Mienmit, *supra* note 229, at 149.

²⁵¹ Office of the National Economic and Social Development Board (NESDB), 11th *National Economic and Social Development Plan (2007-2011)* (in Thai), online: NESDB <<http://www.nesdb.go.th/Default.aspx?tabid=395>>.

²⁵² "Hot spots" shown conflict sites on Ban Khunte map are marked based on estimates from the news regarding an incident in which lowlanders blocked five roads that highlanders use for transportation to Chiang Mai.

decades, the villagers in this area have had major natural resource management conflicts.²⁵³ The lowlanders²⁵⁴ accused the highlanders²⁵⁵ of over use of upstream water, and of contaminating the water with pesticides. With support of the “dark green” conservation group²⁵⁶ from Muang Chiang Mai District, the lowlanders blocked the road and burned a temple in a village close to Ban Khunte.²⁵⁷

After that incident, the areas surrounding Chom Thong District, including Ban Khunte, became a battle ground for forest conservation and livelihood among Hmong, Karen, and the lowlanders. The highlanders have had to reconsider themselves and their way of life. They know that they cannot move to the city because there is no space left for them there, and they do not want to change their lives completely and abandon their traditions.²⁵⁸ Every step that the highlanders now take has to consider conservation and other users of natural resources.

Another conflict happened during the reforestation project at Doi Song Muang (ดอยสล่องเมือง).²⁵⁹ This project was initialized and funded by a large petroleum company that promotes natural resource preservation and supports the DNWP and the dark green environmentalists’ group from Muang Chiang Mai; however, the villagers did not agree with their forest plantation concept. The villagers thought that the forest should be left alone to re-grow naturally, since this was part of their traditional practice. Moreover, they were concerned that when they finished the plantation they would be excluded from the land and would not be able to access the forest like they did before. The villagers protected this land, as it was their own land. They made a buffer zone for forest fires, but this time the villagers used it to protect their land from the outsiders.²⁶⁰ The villagers’ opposition stopped the project and upset the proponents

²⁵³ Ban Khunte Community, *supra* note 232; “News on the Conflict in Chom Thong District” (in Thai), *Sarakadee Magazine*, online: Sarakadee <<http://www.sarakadee.com/feature/1999/12/people-forest.htm>>.

²⁵⁴ “Lowlanders” here means local people who live in the foothills.

²⁵⁵ “Highlanders” here means indigenous peoples who live in the hills above, namely the Hmong and Karen.

²⁵⁶ “Dark green” refers to extreme biocentric environmentalist groups that want to keep all human activities out of forest areas and do not believe that people can live sustainably with the forest.

²⁵⁷ “The Truth about the Problem of People and the Forest in Chom Thong” (in Thai), *Sarakadee Magazine* (December 1999), online: Sarakadee <<http://www.sarakadee.com/feature/1999/12/people-forest.htm>>.

²⁵⁸ Interview with Nattawit, *supra* note 249.

²⁵⁹ Interview with Rangsan, headman of Ban Khunte, Jomthong District, Chiang Mai Province (1 November 2010)

²⁶⁰ Interview with Nattawit, *supra* note 249.

because they would have received 2,000-3,000 baht per rai if this project had gone ahead. This was a struggle between the villagers' livelihood and the benefit to other groups.

The lowlanders and the dark green environmentalists tried to push the hill tribes out of the PAs. Then the villagers in Ban Khunte, who had already joined civil rights groups, such as the Sustainable Development Foundation (North), the Northern Farmer's Network (เครือข่ายเกษตรกรภาคเหนือ คนน.)²⁶¹ and the Federation of Northern Farmers' Networks (สหพันธ์เกษตรกรภาคเหนือ สกน.),²⁶² went to join the protest in Bangkok with the Assembly of the Poor (สมัชชาคนจน),²⁶³ who were demanding that the government resolve poverty, help landless farmers, and stop relocating people living in PAs. Later, the villagers from Ban Khunte also joined the political reform movement and proposed the protection of community rights in the *Constitution*.²⁶⁴ All these movements helped them to survive the forced eviction from their land and helped them fight for their right to maintain their village in the traditional way.

4.3.3 Coping with the Development Project

The villagers of Ban Khunte found themselves in a difficult situation when they could not practise their rotation cultivation anymore, and while they were under the threat of relocation.

²⁶¹ A group of farmers in the north of Thailand formed a grassroots group in 1992 to oppose government policy on relocating people from forest areas. The group also advocates on other issues concerning natural resource management. See Chris Baker & Pasuk Phongpaichit, *A History of Thailand* (New York: Cambridge University Press, 2005) at 217; Regina Birner & Heidi Wittmer, "Using Social Capital to Create Political Capital: How Do Local Communities Gain Political Influence? A Theoretical Approach and Empirical Evidence from Thailand" in Nives Dolsak & Elinor Ostrom, eds., *The Commons in the New Millennium: Challenges and Adaptation* (Boston: Massachusetts Institute of Technology, 2003) 291 at 308; see also their activity as described in the *Bangkok Post*, online: Bangkok Post <<http://www.bangkokpost.com/news/investigation/242924/pheu-thai-old-promises-new-promises>>.

²⁶² A group of people in the north of Thailand who organize movements and political agendas concerning the grassroots such as protection of farmland, farmers' debts resolution, natural resource management, citizenship for hill tribes, and land reform. See Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties under Article 9 of the Convention: Thailand*, CERD/C/THA/1-3, UN CERD (23 September 2011) at 33, online: OHCHR <www2.ohchr.org/english/bodies/cerd/docs/CERD.C.THA.1-3.doc>.

²⁶³ This is a group of grassroots people who have natural resource management issues and problems due to government policies. One of the member groups is the village of Pak Mun Dam, where the villagers lost their livelihood due to dam construction. The Assembly of the Poor takes collective action on poor people's problems and demands solutions from the government. This group was founded in 1995, at the beginning of the farmers' group movement in north-eastern Thailand. One of their well-known activities was their protest in front of the cabinet chambers from February-May 1997, until the government accepted their 11 requests to resolve the problems of the poor. See Chris Baker, "Thailand's Assembly of the Poor: Background, Drama, Reaction" 8:1 South East Asia Research 5, online: Living River Siam <http://www.livingriversiam.org/thai/pm/pm_a/ae13.pdf> .

²⁶⁴ Interview with Nattawit, *supra* note 249.

They petitioned the King to allow them to give their land to the Royal Project to protect their village. In 1997, the Royal Project came to survey their land and finally set up the demonstration farm in Ban Khunte. The villagers worked along with the Royal Project as daily employees. The villagers provided their traditional knowledge about herbs and local medicines, collecting and gathering seeds and nursing these herbs on the project's farm.²⁶⁵

The development project recently introduced coffee cultivation to the villagers so that they could plant without clear cutting for the plantation. Coffee seems to be something that the villagers can grow around their houses and can be planted interspersed with the trees in the forest.

The villagers stopped their rotation cultivation after the development project introduced the conservation concept to them. Although rotation cultivation is a Karen tradition, the villagers were forced to adapt themselves to the new concept of conservation. The villagers called this action a return of the land back to nature, and they are proud to show the outside world their results – the trees growing back and becoming a fertile forest again.²⁶⁶

4.3.4 Relationships with the Authorities

In the 1980s, there were conflicts between lowlanders and highlanders. Due to their tradition of rotation cultivation and the cash crops that were introduced to the highlanders, the lowlanders accused the highlanders of causing deforestation and told the DNWP to arrest and remove them out of the PAs.²⁶⁷ In the past, the DNWP officers from Doi Inthanon National Park arrested the villagers occasionally.²⁶⁸

The villagers divide the DNWP officers into two groups. The first one is from the watershed management unit. This group tends to be friendly with the villagers by providing knowledge to help preserve their natural resources. The second group comes from the patrol unit; their officers do not “get along” with the villagers and “do not understand” the culture of

²⁶⁵ Cooperation Division for the Royal Project in Department of National Parks, Wildlife, and Plant Conservation, “Demonstration Farm in the Royal Project at Ban Khunte” (in Thai), online: DNWP <<http://www.dnp.go.th/rsd/project-area/north/kuntae/>>.

²⁶⁶ Interview with Nattawit, *supra* note 247.

²⁶⁷ Charoennyomphrai, Tewicharoenporn & Mienmit, *supra* note 229.

²⁶⁸ Interview with Rangsan, *supra* note 259.

the people, especially when the officers strictly enforce state forestry law without recognition of the villagers' community rights.²⁶⁹

Sometimes the military also becomes involved in conservation. The military is part of the Royal Project. The villagers used to be in conflict with the high commander who was in charge of the Royal Project. He saw the lumber that the villagers kept under their houses and he ordered his subordinates to seize it and arrest the villagers. Although the villagers explained to him that this was the lumber that they got from the utilized forest area under approval from the CFM committee, he did not listen to the villagers. Later, the villagers submitted a petition to have someone else placed in this position who understood their CFM and traditions.

The DNWP officer who seems to understand the villagers is the Ob Luang National Park head officer. He was involved in the JoMPA project and participated in the mapping project with the villagers until the three-dimensional map was completed and approved by every sector. The fundamental goal of the cooperation between DNWP officers and the communities who practice CFM is to encourage communities stay in the same area and to not expand further into preserved forest areas.²⁷⁰ In turn, the villagers have become watch dogs for the DNWP when outsiders violate the rules. Among themselves, the villagers have their way of handling infractions within the village by first using the CFM regulation. If violations of the CFM rule continue to occur, they will ask for help from the DNWP.

This cooperation between the DNWP and the villagers in Ban Khunte has set the standard for cooperation between communities and government officers. Even if the DNWP replaces an officer who takes responsibility in this area, the new officer has to simply follow this precedent.²⁷¹

4.3.5 Community Forest Management

In 1992, Ban Khunte set up their CFM committee and began to practise their CFM according to a concept that a university researcher introduced to the villagers,²⁷² merged with their Karen traditions. At the same time, the villagers joined the Network of Highlander

²⁶⁹ Interview with Nattawit, *supra* note 249.

²⁷⁰ Interview with Pramot, DNWP officer (8 November 2010).

²⁷¹ *Ibid.*

²⁷² At that time, there started to be research on community forest management using local knowledge. This project was carried out by a team led by Sane Jamarik and another team led by Anan Kanjanapan.

Conservationists in Chom Thong. Meanwhile, the villagers also included the government policy to eradicate drug use among youth in their regulations.²⁷³ This illustrates that their community regulations reflect issues that come to their attention, and that they adjust their rules from time to time to fit the situation in the village. Their CFM regulations form part of the general community regulations, which include various rules concerning all aspects of life in the village that the villagers think are important to regulate. The process of drafting the community regulations of Ban Khunte is carried out by holding meetings of the community committee and then taking the draft regulations to a referendum of the villagers.²⁷⁴

4.3.5.1 The Contents of the Regulations

There are two parts to the Ban Khunte regulations: the general regulations and the regulations on natural resource conservation.

The first part of the general regulations contains the rules governing conduct in the village; these are designed to preserve order and keep the peace. For example, there are regulations prohibiting fighting, shooting, making loud noises, stealing, damaging public assets, drug trafficking, gambling, pornography, and sexual harassment.²⁷⁵ The first part also includes a confirmation that everyone in the village must follow the regulations,²⁷⁶ and a process to amend the regulations by approval in a public meeting.²⁷⁷

²⁷³ Ban Khunte Community, *Regulation on Natural Resource Management of Ban Khunte*, rev. ed. (in Thai) (Chiang Mai: Ban Khunte Community, 2008) [unpublished] [Ban Khunte Regulations].

²⁷⁴ Interview with Nattawit, *supra* note 249.

²⁷⁵ Ban Khunte Regulations, *supra* note 273.

Villagers in Ban Khunte issue regulations that are important for their daily lives, and that also mirror state government policies, such as the war against drugs and the prohibition against sexual harassment (*ibid.*, c. a, ss. 2–10.). Most of these prohibitions are already criminal offenses under state law. However, the villagers are at the forefront in terms of enforcing criminal sentences. They prioritize some offences and enforce them directly based on their community regulations. All of these offences carry fines of, from 300-500 baht (\$10-14 CAD). The community will also forward these criminal charges to the police, and will require defendants to pay compensation to their victims if appropriate (*ibid.*, c. a, ss. 2–10.). If the situation is beyond their ability to deal with, they will also ask for help from the police (*supra* note 249).

Other than in the criminal prohibitions, the first part of the Ban Khunte Regulations shows a tendency to promote community supremacy and provides procedures for implementing these rules. For instance, the regulations allow the villagers to produce their own local liquor (*supra* note 273, c. a, s. 11). Also the villagers require that anyone who wants to conduct research in Ban Khunte has to ask for their permission first (*ibid.*, c. a, s. 1). When I conducted this research, I also sent my request to the community and they set up a meeting when I arrived in the village and discussed the issues concerning their CFM with the headman, the CFM committee members and a representative of the Ban Khunte youth group.

²⁷⁶ *Ibid.*, c. a, s. 14.

²⁷⁷ *Ibid.*, c. a, s. 13.

The second part of the regulations on natural resource conservation is divided into four sections: there are the general rules on conservation and a section on each of the three types of land use. The regulations categorize the use of land into three types: conservation, utilization, and arable land.²⁷⁸

The first section of this second part contains general rules about CFM and conservation. This section can be grouped into three categories: forest fires, zoning, and using natural resources.

Regarding forest fires, there are rules about both participation and prevention. The villagers have to participate in making fire breaks²⁷⁹ and to extinguish forest fires when they occur.²⁸⁰ The penalty for anyone who intentionally causes a forest fire is a fine of 1,000-5,000 baht²⁸¹ (approximately \$33-160 CAD) which is considerably higher than the fines for criminal offenses in the first part of the regulations. In case of burning to clear their land for cultivation, the villagers have to recruit other villagers – up to 10 persons – and make a fire break of four to eight metres in width.²⁸² This shows that the villagers take forest fires very seriously. One of the reasons might be because of the severe air pollution problem in Chiang Mai over the last decade, and the villagers' desire to respond to the government anti-pollution policy.²⁸³ They are also concerned about preventing themselves from becoming a target of lowlanders who have blamed them for setting fires in order to seek mushrooms, and for burning to re-cultivate farmland, both of which cause forest fires and air pollution.²⁸⁴

Another section of the regulation is concerned with zoning. One of the villagers' major tools for managing their CFM is to classify the forest areas and regulate them according to the

²⁷⁸ *Ibid.*, c. a, s. 1.

²⁷⁹ *Ibid.*, c. b, s. 1.2.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*, c. b, s. 1.7.

²⁸² *Ibid.*

²⁸³ Office of Natural Resources and Environmental Policy and Planning, "Working Group on Forest Fire Solutions and Warning about Air Pollution in Chiang Mai" (2009), online: Government of Thailand <http://www.onep.go.th/index.php?option=com_content&task=view&id=509&Itemid=0>.

²⁸⁴ Pirat Trakansirion, "Smoke and Forest Fires: Major Problems for Chiang Mai"(in Thai) *Chiang Mai News* (31 January 2011); Parichai Klinkhachon, "Forest Fires and Smoke" (in Thai) (1 February 2009); information from the Thai Society by Princess Maha Chakri Sirindhorn Anthropology Centre (in Thai), online: Down to Earth <http://downtoearthsofsc.thaigov.net/index.php?option=com_content&task=view&id=145&Itemid=8> .

use of each area, for example: conservation forest, utilized forest, and arable land.²⁸⁵ The villagers have to divide the land clearly and put up signs in each area.²⁸⁶ The villagers in Ban Khunte use technology to help them manage their CFM. Use areas are set out on the GPS map precisely; every piece of land where CFM activities are conducted is indicated. The villagers received strategic support from IMPECT,²⁸⁷ with funding and training from the Joint Management of Protected Areas project (JoMPA),²⁸⁸ a project managed through cooperation between the Thai and Danish governments that encourages people's participation in conservation in PAs.

The last section in the general conservation rules is about how people should use their resources. The villagers can use non-timber products from the forest, but they have to use them wisely, not wasting any part of the natural resources.²⁸⁹ Logging for sale to outsiders is strictly prohibited.²⁹⁰ The penalty is a fine of twice the value of the timber and seizure of the timber.²⁹¹

After the general rules on conservation, there are three sections according to the type of area – conservation forest, utilized forest, and arable area. In the conservation forest, hunting, logging, burning, and cultivating are prohibited.²⁹² The penalty is a fine of up to 5,000 baht (approximately \$166 CAD).²⁹³ Catching any kind of aquatic animals in the aquatic conservation area will result in a fine of up to 500 baht (\$16 CAD).²⁹⁴ However, the villagers can collect non-timber products in the conservation area, such as herbs, banana leaves, and fruits.²⁹⁵

²⁸⁵ Ban Khunte Regulations, *supra* note 273, c. b, ss. 2-4.

²⁸⁶ *Ibid.*, c. b, s. 1.4.

²⁸⁷ Interview with Khajon, male villager of Ban Khunte, Jomthong District, Chiang Mai Province (1 November 2010).

²⁸⁸ "Indigenous Peoples and Protected Areas in Thailand: A Review" (10 January 2011) Inter-Mountain Peoples' Education and Culture in Thailand Association, online: Forest Peoples <http://www.forestpeoples.org/sites/fpp/files/news/2011/01/Media%20briefing_Thailand_IPs_and_PAs_Sharing_%20Power_2011_Eng.pdf>.

²⁸⁹ Ban Khunte Regulations, *supra* note 273, c. b, s. 1.5.

²⁹⁰ *Ibid.*, c. b, s. 1.3.

²⁹¹ *Ibid.*

²⁹² *Ibid.*, c. b, s. 2.1.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*, c. b, s. 2.4.

²⁹⁵ *Ibid.*, c. b, s. 2.2.

In the utilized forest, the villagers can take timber to build a house after receiving permission from the CFM committee.²⁹⁶ The timber cannot be taken out of the area of the Network of Highland Conservationists of Chom Thong for commercial purposes.²⁹⁷ The penalty for infringing this rule is a fine of up to 5,000 baht (approximately \$166 CAD) and seizure of the timber.²⁹⁸ Cultivation is also prohibited in the utilized forest.²⁹⁹ Violators will be fined up to 500 baht and the cultivated land will be seized.³⁰⁰

The last section concerns arable land. Each household has to publicly declare the amount of land that they use for cultivation.³⁰¹ Once this is done, the CFM committee will indicate the zoning on the GPS map. When villagers need to expand their arable land within the village area, they are first required to get permission from the committee.³⁰² Otherwise, the newly expanded area of land will be expropriated and taken back to the forest.³⁰³ The CFM committee will only approve land expansion after conducting a survey.³⁰⁴ In case of expansion of cultivated land to be used outside the community, the Ban Khunte committee has to consult on this issue with a committee from the Natural Resources Management Conservation Group in Chom Thong District that consists of the National Park and the Network of Highlander Conservationists of Chom Thong³⁰⁵ and other partners from JoMPA. An agreement would mean expanding the cultivation area into the forest area and amending the GPS map. Such an agreement would only be reached if the expansion were absolutely necessary.³⁰⁶ Moreover, the regulations prohibit sale or rental of arable land to outsiders and the penalty is a fine of up to 500 baht (\$16 CAD), with the land being returned to the community.³⁰⁷

²⁹⁶ *Ibid.*, c. b, s. 3.2.

²⁹⁷ *Ibid.*, c. b, s. 3.3.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*, c. b, s. 3.1.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*, c. b, s. 4.1.

³⁰² *Ibid.*, c. b, s. 4.2.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*, c. b, s. 4.4.

³⁰⁵ This group was established when the conflict between lowlanders and highlanders erupted. See more detail in section 3.3.1, above.

³⁰⁶ Interview with Nattawit, *supra* note 249.

³⁰⁷ Ban Khunte Regulations, *supra* note 273, c. b, s. 4.3.

This regulation is interesting in that it is similar to the regulation in Ban Huaieikhang that prohibits selling land to outsiders. The difference is that Ban Huaieikhang land is privately owned and is under jurisdiction of the *Civil and Commercial Code*,³⁰⁸ which permits owners to freely dispose of their lands. In fact, the regulation of Ban Huaieikhang is actually contrary to the *Civil and Commercial Code*, but the regulation would apply as the law of the commons.³⁰⁹ Because the land in Ban Khunte is actually in the national park area, it is public land and cannot be transferred by individuals.³¹⁰ Hence, the regulation prohibiting selling the land is not strictly necessary, but its inclusion shows the intention of the villagers to reaffirm the legitimacy of their CFM.

4.3.5.2 Enforcement

The CFM committee tries to enforce the regulations very strictly. They use three ways to enhance implementation.³¹¹ The first is via the traditional belief system. This works very well for most villagers. For example, most villagers will not harm the trees and wild animals in the spiritual forest. The second tool is written regulations. When villagers do not believe in the traditions anymore, then they will not respect the forest anymore either. Consequently, the CFM committee needs to draft written regulation and set penalties for violations within the village. Then they can enforce the regulations, which are passed by the consensus of the majority in the village. This helps to ensure that the villagers abide by their own agreement. The last resource is the state authorities. If a person violates the regulations and does not abide by the CFM committee's decision as to the penalty, the CFM committee will ask for help from national park officers or the police.³¹²

So far, the implementation of the CFM regulation in Ban Khunte has worked smoothly. However, there have been some problems collecting fines from people who violate the CFM regulations.³¹³ For example, there were a few violations such as causing forest fires during the harvesting season, but they did not cause much damage. The villagers helped to extinguish the

³⁰⁸ *Civil and Commercial Code*, Royal Thai Government Gazette 196:42 (8 April 1992), c. 4, art. 1299 .

³⁰⁹ See Chapter 6, section 6.1.3.1, below, for more discussion on this topic.

³¹⁰ *Civil and Commercial Code*, *supra* note 308, s. 1307.

³¹¹ Interview with Nattawit, *supra* note 249.

³¹² *Ibid.*

³¹³ *Ibid.*

fires and tried to prevent them from spreading. Another example is villagers taking wood from the forest without permission from the CFM committee.

The main problem with enforcing the regulations via traditional beliefs is that many of the younger generation have gone to study in the city. The youth receive modern education and no longer believe in spiritual concepts and the supernatural. New technology has affected the cultural way of life. In the old days, the villagers did not ask questions when the elderly told them not to do something that was considered taboo, such as not cutting or using the trees from a channel between two hills or not killing gibbons, which the Karen believe will cause bad luck.³¹⁴ However, the younger generation will ask why they are not allowed to do such things and might refuse to follow the rules of the elders.³¹⁵

An example of the declining belief in tradition is the “umbilical cord forest”. In the Karen tradition, when a baby is born, they attach the umbilical cord to a big tree because they believe that the tree will protect the baby. And when the baby grows up, that baby will look after the tree.³¹⁶ They call an area that has these kinds of trees an “umbilical cord forest” and treat such an area as a spiritual place. Anyone who cuts a tree in an umbilical cord forest has to pay compensation to the person who attached an umbilical cord to the tree. Nowadays, villagers usually give birth in hospital in the city. A hospital normally does not keep the umbilical cord, but the parents can ask the hospital to do this. However, some of the younger generation do not want to attach their babies’ umbilical cords to trees anymore because that practice requires a spiritual ceremony that they think is burdensome.³¹⁷

The enforcement of CFM has shifted to using new technology like GPS that helps the villagers to resolve disputes over forest land. Since they have used the GPS map that was surveyed and approved through the cooperation of all stakeholders, everyone has grasped how the land is zoned, and this has helped to reduce the number of disputes that used to take place.³¹⁸

³¹⁴ Interview with the *Hekho*, *supra* note 248.

³¹⁵ Interview with Sanon, *supra* note 236.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ Interview with Khajon, *supra* note 287.

Ban Khunte CFM is also balanced in terms of gender roles. For one thing, their CFM committee has a female member; there are approximately 10 committee members.³¹⁹ Further, in the practice of their CFM, women's roles – such as collecting non-timber products, farming and harvesting – are as important as the roles of men.³²⁰ Additionally, when the villagers went to Bangkok to advocate for their CFM along with other civil rights groups, the women in Ban Khunte went with the men.³²¹ The women also want their children to have a peaceful place in which to live and maintain their traditions. As well as fighting for their rights, they have to teach their children how to continue the practice of CFM.³²²

Community bonds in Ban Khunte still work effectively. Due to the location of the village far from the city – in a high mountainous area 1,200-1,400 metres above sea level, on a bumpy road, it is considered to be a peaceful and quiet village. In addition, most of the members of the village are related, belonging to a limited number of family groups.³²³ The villagers maintain their strong sense of community. They are committed to helping each other with harvesting for free, and they will get this help in turn when they harvest their crops. This is called Aow Mua Aow Wan in the north and Long Khaek in central Thailand. This is practical, because otherwise villagers would have to be paid minimum wage for their labour, as with public building construction.³²⁴ In Ban Khunte, it is the headman and the village committee who enforce their community's regulations, including the regulations governing CFM. The headman's role is also to mediate in community disputes.³²⁵ His assistant and the community committee will support him when a situation gets out of control. It is mainly the unity among the villagers that makes their regulations function well. The village has volunteers who promote understanding of the regulations and CFM.³²⁶ Anyone who violates the community rules will be pressured by the community. This is based on the fact that the regulations are derived from public consensus and can be adjusted in public meetings when necessary.

³¹⁹ Interview with Nattawit, *supra* note 249.

³²⁰ Interview with Namjai, *supra* note 226.

³²¹ *Ibid.*

³²² *Ibid.*

³²³ Interview with Sanon, *supra* note 236.

³²⁴ Interview with Rangsan, *supra* note 257.

³²⁵ *Ibid.*

³²⁶ Interview with Nattawit, *supra* note 249.

4.3.5.3 Technician Villagers

The villagers use GPS to make their maps because they want to show how they manage their land and preserve their CFM. At first, the villagers made their maps using the large-scale model that they learned to use through the training program at the Department of Geography, Chiang Mai University. But this model map was not acceptable to the RFD and DNWP officers. The officers did not believe in the process that the villagers used to indicate land use on the map, as anyone could have pointed to an area and claimed their rights to it on the model map, whereas the claimed area might be different from the actual location on the ground.³²⁷

Based on the need to indicate the actual location, they came up with the idea to use GPS, and received assistance from IMPECT. In 2006, the village's volunteer survey team received training from JoMPA and IMPECT to use GPS and to make a map. They used a military map as the basis for their GPS map and compared it with aerial photographs. The team surveyed their entire territory using satellite GPS, going together to specific areas with the villagers who dwelled there, with their neighbours, with a representative from the national park and a representative from the local administrative body.

When the mapping was finished, the stakeholders in this project signed and approved the map.³²⁸ The villagers use this map as a guide for their land use and conservation, and whenever they have any doubts about land use or trespassing. The map reassures villagers that the forest land will not disappear and be degraded by any wrongful act. However, the map is only a document, a social contract between the community and government agency to recognize the community's land rights and the commitment of the community to preserve the forest; maintenance of CFM also requires the ethics of the people to make good use of the concepts represented on the map.

4.3.6 Taking the New Generation Back to Traditional Beliefs

Most members of the new generation in Ban Khunte receive their higher education in the city and believe in modern knowledge more than in traditional beliefs, and they question the practices that sometimes cannot be explained by science. There are youth groups in the village

³²⁷ Interview with Khajon, *supra* note 287.

³²⁸ IMPECT, SLUSE, CARE, SDF, the District of Chom Thong, the Ob Luang National Park, the Demonstration Farm of the Royal Project, the Doi Khaew TAO, the Sup Tea TAO, the Network of Highlander Conservationists of Chom Thong, and the Mae Tea-Mae Te Watershed Network.

that organize a variety of activities such as Sport against Drugs (Kela Tan Yaseptid)³²⁹ and environmental and cultural projects teaching local knowledge, and providing training about traditional herbs and CFM.³³⁰ However, the youth in Ban Khunte generally have their own interests and have become more individualized. They follow their school friends in the city rather than youth of the same age in the village.³³¹ Nevertheless, the *Hekho*, the title of the Karen community spiritual leader, tries to educate the new generation about their traditional knowledge and their ethnic identity to help them take pride in themselves. However, the *Hekho* still worries about the capitalism that continues to influence the village and is not sure how to cope with it.³³² This situation does not only occur in Ban Khunte alone; it happens everywhere in the ethnic minorities' villages and even in the local villages. It would be a matter of self-determination if this were really to change.

4.3.7 Controversial Land Title

As mentioned earlier, Ban Khunte is located in PAs: Doi Inthanon National Park and Ob Luang National Park. In addition, the villagers participate in the indigenous rights movement, and in the civil rights movement, along with the farmers and the poor, on the issues of poverty and landless farmers.³³³ One issue that was raised by both movements is community land title. The indigenous peoples' movement agreed to join in this request to the government³³⁴ as well, because they are also directly affected by PAs overlapping with their land. Moreover, because the *Community Forest Bill* was not adopted, they do not have any tangible legal support except from the *Constitution*, which is still subject to ongoing debate about direct enforcement.

The villagers still believe in the legitimacy of their CFM more than in the government policy on community land title, which may be subject to change if political leadership

³²⁹ This is a government project that tries to create activities for the youth in every village to keep them away from drugs.

³³⁰ Interview with Khom, teenage boy in Ban Khunte, Jomthong District, Chiang Mai Province (1 November 2010).

³³¹ *Ibid.*

³³² Interview with the *Hekho*, *supra* note 248.

³³³ Interview with Khajon, *supra* note 287.

³³⁴ "Thailand Indigenous Peoples' Assembly 2009: Natural Resource Management by Communities" (in Thai), *Prachatai News* (8 August 2009), online: Prachatai <<http://prachatai.com/journal/2009/08/25369>>.

changes.³³⁵ Thus, they feel they still need to participate in the land title movement until it becomes clearer whether they will indeed benefit from the government's land title policy

4.3.8 Lessons from Ban Khunte

The villagers in Ban Khunte have adapted throughout many changes, implementing their CFM and surviving conflicts over natural resources. They provide many lessons about how to make use of experience, technology, evidence of reforestation, and support from authorities. However, the villagers face challenges to their CFM; they need to address restraining growth, transferring knowledge to the new generation, and what their next move will be.

4.3.8.1 Adjusting to Experiences

Some steps that the villagers in Ban Khunte took to manage their community forest came as a result of pressure they received from outsiders. They have used both positive and negative responses and turned them into opportunities to adapt and move on. In the past, the lowlanders accused them of using chemicals and contaminating the natural environment and of causing forest fires. These accusations forced the villagers to adapt themselves³³⁶ to middle-class environmental concerns.³³⁷ As we can see from the community regulations on conservation in Ban Khunte, villagers take forest fires very seriously. This is also a result of the positive effect of cooperating with the national park authorities to prevent forest fires.

The community regulations also contain many borrowed laws, such as laws on community rights and local knowledge, on liquor, on women's rights, on sexual harassment, and on the survey and GPS mapping technology that the villagers received during their training program sponsored by civil rights advocacy NGOs.

In terms of actual practice, the villagers have had to give up some of their traditions to survive. They had to stop rotation cultivation because the national park laws do not permit them to continue this practice. They then had to face the difficulty of cultivating the same piece of land without using rotation, which they thought damaged the land faster than their traditional cultivation methods. Then, they used chemical fertilizers instead of moving

³³⁵ Interview with Rangsan, *supra* note 259.

³³⁶ *Ibid.*

³³⁷ "Middle class environmental concerns" are usually different from the environmental concerns of the grassroots movement, which is made up of poorer people who have to focus on survival and who may lack education or information about environmental conservation.

cultivated areas to let the soil regenerate – but then the situation became worse because of pollution from chemicals. Finally, they learned eco-friendly methods through the demonstration farm provided by the Royal Project. Although these methods cannot make them rich quickly like cash crops and concentrated cultivation, at least they can survive and live on their land.

4.3.8.2 The Value of Technology

The most obvious evidence of Ban Khunte's CFM is the GPS map. At first, the villagers made their own zoning map after receiving training from members of the Faculty of Geography, Chiang Mai University and IMPECT. However, it was not accepted by the DNWP or the conservation group, as it was viewed by them as being unreliable.³³⁸ Later, the villagers used surveys and GPS to enhance their map. As a result of using the GPS map, disputes about land use were reduced. This is a lesson from the experience of the villagers in Ban Khunte about how people often privilege technology over human beings. It is true that technology is more precise than human beings, who are sometimes biased. Therefore, the villagers use technology to deal with the outsiders and government officers and, occasionally, among themselves when a dispute erupts.

4.3.8.3 Evidence of Their CFM

The regulations and a map alone cannot indicate that Ban Khunte practices CFM successfully. From my observations in Ban Khunte, there are more trees growing in the forest area around the village than in other forest mountain areas. This is evidence that the villagers have to demonstrate to the public – and especially to conservation groups – that they can preserve the forest; otherwise, the villagers may face the risk of eviction from their lands and their traditional way of life. So, the villagers need to clearly express themselves. Meanwhile, pictures of new houses and facilities such as satellite dishes show the well being of the villagers. So far, the trees surrounding the village show that the villagers' CFM and their demonstration farm work very well.

³³⁸ Interview with Khajon, *supra* note 287.

4.3.8.4 Getting Support from the Authorities

There are two main forms of support from the state in Ban Khunte – Ob Luang National Park and the Royal Project. In terms of the national park, cooperation between the villagers and the DNWP is needed on both sides. Each takes one step back to compromise with the other. The villagers stopped rotation cultivation, while the DNWP recognized the GPS map and supported the villagers when needed, such as in cases of outsider trespassing.

The second form of support comes from the Royal Project. At the beginning, it was unclear whether the Royal Project would really benefit the local villagers. Sometimes, development projects introduce cash crops and concentrated cultivation, which leave the villagers with more debt and environmental contamination. However, the Royal Project's Demonstration Farm helps the villagers in Ban Khunte to preserve their traditional knowledge about herbs, and the villagers have also received new knowledge about agroforestry, which can be a substitute for their rotation cultivation.

4.3.8.5 Growth Causes Tension

There are some factors that can limit Ban Khunte in the practice of their CFM. The first issue is the community's growing population. In some areas, people tend to move to the city, but in Ban Khunte the population is slowly increasing.³³⁹ In some ways, this supports the survival of CFM in Ban Khunte, ensuring that it will not become an abandoned village. Because the villagers can live and raise their families within the village, they do not need to move to the city. However, the village is limited in the number of people it can support. A growing population is also a growing constraint on the subsistence livelihood and sustainable development in the village. They cannot expand their arable land. While the villagers have a legitimate claim that they have the right to live in this area because they were there before the land became a PA, and because they preserve the forest, they must first be able to demonstrate these two facts, before being able to claim more land. Otherwise, they do not have good answer for people who have to buy land in the city.

Another dimension of development in Ban Khunte is not the population, but consumption behaviour. The villagers are tending to accept more capitalism as time goes on. Acceptance of new technology like GPS, used wisely, can be good for survival. On the other

³³⁹ *Ibid.*

hand, in everyday life, using technology may lead to more consumption and capitalism. And this hardly complements the subsistence lifestyle. How can the villagers earn more in the forest area without causing any harm to the forest? This is no longer an issue of survival, but of making a living. So, this is the challenge that the villagers face.

However, the villagers in Ban Khunte still have some hope. They have traditional wisdom to help them resist over-consumption. They have their traditional Karen ways of humility and living in harmony, of merging themselves with nature. At the same time, they have new knowledge about eco-friendly practices from the Royal Project and NGOs, who introduced organic herbicides that are less harmful for the environment, and agroforestry products such as coffee, instead of cash crops like chrysanthemums and cabbage.

4.3.8.6 Inheriting Traditional Knowledge and Traditional Beliefs

A transition from the old generation to the new is normal in every culture. When the new generation in Ban Khunte receives a different type of education than their ancestors, they cannot understand and appreciate the local knowledge that they cannot explain clearly, such as belief in spirits and the supernatural. The *Hekho* tries to pass on his traditional knowledge to the new generation. However, it is difficult to fight with modern forms of media like TV. Also, imagination and attitude are important in getting the new generation to see that their traditions are valuable, not just dated and superstitious nonsense. Only they can inherit these traditions.

Actually the traditional beliefs of Ban Khunte are similar to the traditional beliefs implicit in a modern legal education. The villagers believe in natural law, which can also be seen as the rebirth of the neo-natural law concept. This also explains the harmony between humans and nature, and values indigenous knowledge and local democracy. Perhaps this new twist on an old perspective can be used to create consciousness in the new generation.

4.3.8.7 The Next Move

If the CFM process in Ban Khunte can be seen as a journey that the villagers have taken, they have come to a crossroads about community land title and constitutional rights. Indeed, these two concepts do not have to be in conflict. However, they are based on different arguments that can be seen as contradictory. Thus, the villagers have to plan their next move wisely.

Community land title is based on government policy that grants land titles, which can be revoked any time if the villagers do not follow the conditions attached to the title. Moreover, community land title cannot be granted in PAs, so it will not apply to Ban Khunte. If they still want to push this issue, they will have to argue that land title should be granted in PAs, which will lead to more controversy and disagreement. However, Ban Khunte has joined the Indigenous Peoples' Assembly, SDF, and IMPECT, all of which support the movement for community land title. Certainly, community land title has to be carefully granted to villages under conditions.³⁴⁰ However, land title may not benefit them. Even if they can negotiate and get title to their lands, there is no guarantee that this will help to sustain their CFM and their livelihood. Further, because community land title is just a government policy, it can change if there are changes in government.

In contrast, CFM is protected by the *Constitution* and it is legitimate. The fight for constitutional rights will likely be a long fight. Currently, there is no light at the end of the tunnel. Enforcing the *Constitution* directly depends on a legal culture which has not yet come into being. Perhaps they should send a petition to propose another general community rights bill, one that addresses more than just CFM. This process has already been initiated, but there has been no further progress yet.

The villagers have to choose and make their stand clearly. They must decide on their next move and not contradict themselves. However, for the time being, Ban Khunte's CFM seems to be safe.

In this section, I have illustrated how the selected communities have established their CFM and applied their own regulations to govern the use of their community forests. In the next section, I will analyze the data gathered about these communities in terms of legal consciousness and their implementation of law concerning CFM. I will use the living law concept to explain these phenomena.

³⁴⁰ *The Prime Minister's Office Regulation on Community Land Title Establishment 2010*, Royal Thai Government Gazette 127:73d (11 June 2010); see Chapter 3, section 3.4, above, for more information on this topic.

4.4 Analysis of Law Enforcement by Local People: Legal Consciousness of Selected Communities

In this section, I apply three groups of concepts: 1) legal consciousness to explain how ordinary people react to the law; 2) community type to reflect how these three communities interact with the law; and 3) multi-level analysis to explain the communities' collective actions concerning their CFM and state law.

First, I use the Ewick and Silbey approach³⁴¹ to legal consciousness to explain how the villagers react to state forestry law and the *Constitution*. The villagers in the three selected communities first looked at state forest law and national park gazettement as intruding on their livelihood; at that point the villagers played the role of being "against the law". However, later, when they realized that they had to comply with forest conservation, they adapted themselves to the conservation law by creating their own regulations. The villagers in Tambon Maetha and Ban Khunte, after they received training programs from the government and NGOs, changed from being "against the law" to being "with the law" because they came to know when to apply what level of law. Thus, they became "players" in the game of law. Basically, they apply their CFM regulations because they are useful and they feel that the regulations are for their own benefit. They also use maps as supportive tools in dealing with outsiders and government officers. The villagers know how to negotiate with the officers. When the villagers became aware of the *Constitution* and were part of the public hearing process around the *Community Forest Bill*, they used the Bill to bargain for their rights to use the forest and participate in forest conservation.

Hill tribe villages like Ban Huaieikhang, before having state forestry law threatening them, were "before the law" because the law was remote and alien to them. The villagers did not know the state law until the Indigenous Peoples' Network formed an organization around natural resources. The villagers were "under the law" when the national park took away their right to live on the land that had become a gazetted forest area, and when the villagers felt that the law enforcers tried to use the law against them. This occurred when the RFD arrested villagers who cleared their lands in the "agricultural zone" of their CFM areas.

³⁴¹ Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998).

On the other hand, the lawyers whom I will describe in the next chapter may also have an “under the law” perception of the villagers’ CFM regulations, which many of them view as being illegitimate. This attitude leads to an attempt to terminate or ignore the law. However, based on the reflection of their legal consciousness, their attitude about the law is not an eternal perception – it can change during implementation (actually, their attitude might be against enforcement rather than against the law itself). And it is not against every law – it is only against the law that disadvantages them. This seems like simple avoidance of the law. However, the villagers have the perception that they have the right to use the forest, but state forestry law is unjust when it takes away their right to participate in forest management. Further, the law cannot be trusted to protect their rights.

Second, I will use Roger Cotterrell’s concept of community types to critique how these three selected communities interact with the law. As I explained in Chapter 2, section 2.4, Cotterrell classifies communities into three types.³⁴² The three selected communities can be described as traditional communities because they are all administered geographically – Ban Huieikhang, and Ban Khunte are villages under local administrative law, while Tambon Maetha is a subdistrict under the same law. These three communities drafted their own laws to govern their community forest usage and also use forestry law when their regulations cannot control their community members. Most importantly, the communities always use the *Constitution* as their fundamental support. Although government officers and legal professionals still use the state forestry law, this might be because the *Constitution* is the only written source of law that they can rely on other than the communities’ CFM regulations, which I will later explain as being an example of the law of the commons. Hence, these three communities can be classified as instrumental communities, which are communities that use the law to serve their interests – in this case to participate in forest conservation. Normally, instrumental communities are weak because they are only formed for certain purposes. However, these three communities also exhibit shared values, which are actually a characteristic of belief communities, and they apply these shared values in their CFM regulations. The shared values here are a belief in forest conservation and respect for the forest. Without these shared values, CFM communities will be weak. Another feature of these three communities is the importance of kinship. In fact, a focus on kinship is common in rural Thailand. For instance, in Tambon Maetha, kinship is a link

³⁴² Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot, UK: Ashgate, 2006) at 40.

between strong leaders; and the transfer of knowledge and beliefs from generation to generation provides strong communities. These two features, shared values and kinship, will enhance the communities that practise CFM.

Third, Elinor Ostrom's concept of multi-level analysis³⁴³ will illuminate the many sets of laws that the communities use, as part of both formal and informal collective action. I start by looking at their CFM regulations, which are local-level laws that are used within the community. The next level is state forestry law, which the communities also use as a supportive tool when their regulations are not sufficient to deal with infractions by community members and outsiders. While they use the *Constitution*, which is national law, they actually use it to protect themselves from state forestry law and government agencies. These communities also apply international laws on indigenous peoples as their final tool when they have to stop the state from intruding into their communities.

In terms of informal collective action, the communities have many informal connections through NGOs, Royal Projects, and other government agencies (except the RFD and the DNWP) to assist them, such as local administrative organizations. These informal arenas include the international level, where communities can get assistance from organizations such as JoMPA.

The three concepts that I use in this chapter – legal consciousness, community type, and multi-levels of analysis – describe the legal consciousness, legal implementation and characteristics of the three communities selected for this study.

4.5 Chapter Conclusion

This chapter reflects field research interviews with selected people from three communities. The objective of the interviews was to discover the legal consciousness of the interviewees regarding legal implementation of CFM – how individuals understand the law and apply it in their everyday lives.

This study found that the villagers from three selected villages began being conscious of conservation because of hardships caused by deforestation and pressure from the government to exclude the villagers from forest areas. The villagers rebuilt their communities' traditions of forest management by merging indigenous peoples' concepts with ideas from the NGO

³⁴³ Ostrom, *supra* note 86 at 50.

movement, and called their practice “community forest management”. During the period of social reform, the villagers tried to connect their community forests to the rights guaranteed by the *Constitution*. However, after the *Constitution* was enacted, implementation did not achieve the villagers’ objectives. They still claimed the right to participate in natural resource management by using the community regulations which they enforced among themselves.

The villagers currently use both their CFM regulations and state forestry law to survive and practice CFM. Villagers use the juxtaposition of village CFM regulations as folk law and forestry law as state law to assist themselves whenever needed. The villagers apply their CFM regulations within their villages but, when the situation goes beyond their control, they apply state forestry law. For instance, when a headman cuts community trees for his lumber business, villagers ask DNWP officers to arrest the headman. However, if the forestry law is against them, they use their own regulations. Villagers want officers who “understand” their culture, and villagers will go to the DNWP office to protest against officers who do not understand the villagers until the office removes those officers. When government officers who understand CFM come along, then the villagers work with them to preserve the forest.

In this chapter, I suggest that the community rights as protected by the *Constitution* are not, in fact, superior to other state legislation. When the people try to enforce their constitutional rights in areas where state law is currently enforced, those constitutional rights are almost always trumped by state law.³⁴⁴ Therefore, some people have lost faith in state law and are trying their own methods of applying their rights to participate in CFM. However, communities still need to use the *Constitution* as the legitimate protection of their right to practise CFM.

There are three factors that make the villagers’ CFM regulations work well as living law in the forest: leadership; religious belief; and technology. The reason that I call the

³⁴⁴ When I compare CFM implementation to other cases that are based on community rights, I note that state law normally trumps community rights and the people thus have to find a way to enforce their rights. For example, the right to locally produce spirits (alcohol) is about the community right to produce, but the state law requires a registration process, which costs money. See Constitutional Court of Thailand, Bangkok (4 November 2003) 6/2546. Similarly, in the Yanada gas pipeline case, when a local community used their community rights to participate in natural resource conservation, the state law was interpreted as supporting the gas pipeline project: Constitutional Court of Thailand, Bangkok (17 December 2002) 62/2545. It is not only community rights that are trumped by subordinate statute law; there are other areas of law in which constitutional rights are inferior to state law. For example, in a case involving an individual who had previously had polio and who had been barred from applying for the exam that recruits public prosecutors and judges, the Constitutional Court ruled that the relevant legislation was valid, even though it states that disability will obstruct people in performing their duties as public prosecutors and judges: Constitutional Court of Thailand, Bangkok (1 August 2002) 44/2545.

implementation of CFM regulations “living law” is because they have real function in the community in that they can be used to govern CFM.

An effective leader is key to putting villagers on the right track in forest conservation. The community needs someone to manage and preserve CFM functions. Also, the leader plays a role in connecting the villagers with state authorities, and helping them to negotiate with outsiders. The community needs a liaison who can foster communication between the older and younger generations. Overall, my interviews suggested that a leader performs many functions that help to maintain CFM.

The second factor contributing to the success of CFM is religious belief, which creates sanctions for violation of traditional conservation laws. This is important because regular community or state sanctions are not enough, especially as the villagers do not have police power. Besides performing a kind of watch dog duty, belief in the supernatural forest spirits that must be respected inspires people to protect the forest by obeying the rules of nature which are the foundation of CFM. While fewer people hold these religious beliefs today because of modernization, these beliefs have deep roots within Thai society and still dominate life in many ways. Although social change may have affected traditional beliefs, the shared value of respect for nature and the forest spirit is the key to successful CFM implementation.

The last resource that villagers use for CFM implementation is technology. To enhance CFM, villagers apply technology to make GPS maps and classify land uses. This technology helps to reduce natural resource conflicts. In human relations nowadays, people have become more distrustful of each other and increasingly rely on technology, which is seen as being more trustworthy and precise.

After having described the legal consciousness of local people who practise CFM, in the next chapter I will illustrate the legal consciousness of government officers who have direct authority in forest conservation, and of the lawyers, public prosecutors and judges, whose internal legal consciousness reflects their attitudes on CFM implementation.

In the next Chapter, I will illustrate the external legal consciousness of government officers who have direct authority over forest conservation, and of the internal legal consciousness of lawyers, public prosecutors and judges, in order to reflect their attitude on CFM implementation.

CHAPTER 5 IMPLEMENTATION OF LAW CONCERNING COMMUNITY FOREST MANAGEMENT FROM INTERNAL LEGAL STRUCTURE PERSPECTIVES

To illustrate the government perspective, I present contents from interviews with four groups of government officers from the Ministry of Natural Resources and Environment: officers of the Academic Unit in the Regional Office of Conservation Areas in the Department of National Parks, Wildlife and Plant Conservation (DNWP); the Royal Forest Department (RFD) officers who work in forest reserves; DNWP officers; and officers from the Community Forest Management Bureau (CFMB). These officers have experienced both conflict and cooperation with villagers in dealing with their CFM.

The perspective of members of the legal profession is then illustrated via the opinions of three groups: lawyers who work in the north and are familiar with CFM; prosecutors who deal with CFM cases as criminal cases when villagers are charged with forest trespassing or illegal possession of lumber; and judges who work at the Provincial Court, where most of the CFM cases are heard, and in the environmental branch of the Supreme Court as members of a CFM adjudicators' think tank.

5.1 Perspectives of Government Officers

After presenting the views of selected villagers who practise CFM, I will now look at the views of government officers who directly enforce the law concerning CFM, and about how they view CFM, so that we can discover their legal consciousness about this matter. This section demonstrates the opinions of four groups of government officers who are involved with CFM: officers of the Academic Unit in the Regional Office of Conservation Areas in the DNWP; national forest reserve officers; National Park officers; and Community Forest Management Bureau officers.

5.1.1 Academic Unit in the Regional Office of Conservation Areas in the DNWP

Members of the Academic Unit in the Regional Office of Conservation Areas in the DNWP have had a vision for people's participation in forest conservation since 1992;¹ this was around the same time that activist scholars like Sane Chamarik and Anan Ganjanapan began their research on local knowledge and forest preservation.² Perspectives on CFM among members of the academic unit changed from agreeing with the standpoint of the RFD at the beginning of the logging licensing period, to supporting the need for people's assistance in preserving forest areas. Moreover, the practice of CFM faces some difficulties due to political and administrative problems.

5.1.1.1 The CFM Concept within the RFD

Chaiya, an officer in the Academic Unit in the Regional Office of Conservation Areas in the DNWP, explained that the concept of CFM was introduced to the RFD decades ago from two perspectives. Based on Chaiya's comments, CFM is seen as being similar to forest management and afforestation. The forest managed by the people can be categorized into two types: first, logging villages; and, second, forest villages.³

The first perspective is about communities and the RFD cooperating and working in the forest areas to create forest plantations. The first tasks of the RFD were related to logging licensing but, later, the conservation of natural resources became another of its major obligations. However, the RFD's long role of granting approvals for all activities in the forest area still shapes the authority of the RFD. The government's first perspective on CFM is related to the potential of the logging business. The RFD has a plan to encourage communities to plant trees in the forest area to be logged later on.⁴ This form of forest is similar to the Japanese

¹ Interview with Chaiya, an officer in the Academic Unit in the Regional Office of Conservation Areas in the DNWP (12 October 2010).

² Shalardchai Ramitanon, Anan Ganjanapan & Santita Ganjanapan, *Community Forest in Thailand: Development Alternatives*, vol. 2, Sene Jammarik & Yos Santasombat, eds. (in Thai) (Bangkok: Local Development Institute, 1993).

³ See Verena Brenner, *et al.*, *Thailand's Community Forest Bill: U-Turn or Roundabout in Forest Policy?* SEFUT Working Paper No.3, Socio-Economics of Forest Use in the Tropics and Subtropics (Freiburg: University of Freiburg Press, 1999), online: University of Frieberg <<http://www.freidok.uni-freiburg.de/freidok/>> at 5.

⁴ Ministry of Natural Resources and Environment, "The Ministry's Policy" (24 March 2010), online: Ministry of Natural Resources and Environment, Government of Thailand <<http://www.warehouse.mnre.go.th/dnn/Home/tabid/36/ctl/Details/mid/1118/ItemID/922/Default.aspx>>.

“forest city”.⁵ This idea is different from the CFM this study focuses on.⁶ Moreover, many environmental activists are sceptical about forest plantations because they fear that corporations may take over the forest and affect the ecosystem.⁷

The second perspective is cooperation between the RFD and communities to preserve the forest. The RFD has had goals to encourage people’s participation in forest conservation for decades.⁸ This idea came from the realization that there were not enough RFD officers to patrol and protect the forest. The forest becomes freely accessible when the RFD cannot cover every square kilometre of the forest areas. This is different from the situation with private property, in which owners can theoretically prevent trespassing all the time. Therefore, the RFD needs people to participate in forest conservation.⁹

Hence, CFM is nothing new to the RFD, but is viewed from a different angle and origin when we compare the RFD’s CFM¹⁰ with the villagers’ CFM. The RFD looks at CFM as an opportunity to benefit financially from forest land under its control, while the villagers view CFM as their land and survival. In addition, the RFD officers believe that they already have authority to allow people to use preserved forest areas under sections 16 and 19¹¹ of the *National Forest Reserve Act*.¹² Moreover, in Chaiya’s opinion, the forestry laws are very good

⁵ This refers to the Japanese concept that the government establishes a community that is willing to plant trees to support the lumber business.

⁶ The perspectives of villagers and businesses reflect different objectives. The first is conservation and survival; the second is commercialization of the forest. See the discussion in Chapter 2, section 2.3 about green legal theory, which addresses capitalist over-exploitation of natural resources. In contrast, CFM should minimize the disturbance of nature as far as possible – only enough to survive. This is a concept taught by indigenous people.

⁷ See Oliver Pye, *Khor Jor Kor: Forest Politics in Thailand*, Studies in Contemporary Thailand No. 14, Erik Cohen, series ed. (Bangkok: White Lotus, 2005).

⁸ Interview with Chaiya, *supra* note 1.

⁹ *Ibid.*

¹⁰ See section 5.1.4, below, for more discussion on this topic.

¹¹ Interview with Chaiya, *supra* note 1.

¹² *National Forest Reserve Act 1964*, Royal Thai Government Gazette 81:38 (28 April 1964) 263 [*National Forest Reserve Act*].

Section 16: “The Director-General is empowered, with an approval of the Minister, to grant permission to any person in the national forest reserves in these following cases:

(1) utilization or inhabitation in the national forest reserves for a period of a term not less than five years but not exceed thirty years...”

Section 19: “For purposes of control, supervision, maintenance or improvement of the national forest reserves, the Director-General is empowered to order, in writing, the competent officer or officer of the RFD to carry out any activity therein.”

and can be flexibly enforced by the RFD, even though they were enacted a long time ago.¹³ Therefore, the people's CFM in forest reserves and forest areas¹⁴ is workable for the RFD, but it has to be closely supervised by the Community Forest Management Bureau in the RFD. Most of all, in view of its general upper-level policy, the RFD will not agree to have CFM in PAs such as national parks and wildlife sanctuaries.¹⁵ Also, when the RFD officers deal with CFM, they firstly look at who is practising the CFM and mostly give credit to the communities who register with the CFMB. Meanwhile, CFM as practised by the communities who receive advice from NGOs is viewed sceptically by the RFD. Most of all, the RFD has three serious concerns about the forest: biodiversity; headwaters; and wild animals. These three issues are a priority for law enforcement by the RFD.¹⁶ However, as CFM is one of the ways to preserve the forest, RFD officers are willing to cooperate with the villagers to fulfill these three goals.

5.1.1.2 Watch Dog for Forest Protection

In general, the RFD is worried about many groups of people trying to claim forest land, both physically and financially. These people are, for example, businesspersons, politicians, and sometimes also villagers.

Physically, such persons occupy the forest area and claim their rights to the land.¹⁷ Currently, there are many people who live in the forest areas; some lived there before the land was designated as forest areas, and others are trespassing in forest areas. Therefore, the RFD has a duty to prove the legitimacy of the occupation and use by those persons who occupied the land before it became designated as forest areas.

Forest areas and natural resource management have large budget allocations. For example, there are projects regarding planting trees for the King's and the Queen's birthdays, projects on watershed management and projects on forest fire prevention.¹⁸

¹³ Interview with Chaiya, *supra* note 1.

¹⁴ "Forest area" in this context means the same as "forest area" under the *Forest Act*, *infra* note 45, s. 4(1), which refers to land that no one has acquired pursuant to the *Land Code*, *infra* note 20.

¹⁵ Interview with Chaiya, *supra* note 1.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Projects on reforestation, known as "Pluk Pa Chalurm Prakit" (forest plantations devoted to the King/Queen), began in the early 1990s and are still undertaken for special occasions such as the King's and Queen's birthdays, and the coronation anniversary. Many organizations host such projects. Hosts include the military, the Electricity Generation Authority of Thailand (EGAT), Petroleum of Thailand (PTT) and the RFD/DNWP. Although EGAT and PTT are not connected to forest conservation directly, they

Under the forestry laws, the RFD has direct responsibility to protect the forest from any kind of exploitation. So the RFD has a prevention unit that arrests any person who is trespassing. If the RFD officers know that someone is trespassing in the forest and do not arrest that person, then they can be considered to be negligent.¹⁹ However, it is complicated and difficult to protect forest resources from financial exploitation, or to protect the system from corruption, which mostly comes from inside government agencies. The bottom line is that the forest is a major source of benefit that many people try to capitalize on.

5.1.1.3 The Basic Principle of Law

RFD officers enforce the law according to the basic principles concerning land. Under the *Land Code*, land for which there is no legal document proving ownership or possession becomes a forest area²⁰ and belongs to the Crown.²¹ The RFD then gains authority over such land. This is a core concept for the RFD when they classify types of land and enforce the law.²² Moreover, when forest areas are proclaimed by Royal Gazette as PAs (i.e. national parks or wildlife sanctuaries) those lands will become subject to forest conservation law, which is strictly enforced. All of these lands are under the authority of the RFD and the DNWP. On the other hand, when people have deeds to the land, that land is private property and the forestry laws will not apply.²³ This concept creates a division between public land and private land, and determines who can manage land. This gives the RFD the illusion that they own the forest and that, in turn, restricts the idea that people should be allowed to be in charge of, or even participate in, forest management.²⁴

have projects using forest areas, such as dams, pipelines, coal-fired electricity generators and fossil fuel extraction projects. Therefore, creating forest plantation projects is a way for them to reduce societal tension and resistance from activists. Such huge forest plantations lead to big budgeting; for the project from 2004 to 2011, the DNWP alone had a budget of 100 million baht. Mostly, the budget is used for buying tree seedlings, hiring villagers to plant trees, and maintenance; see Petroleum of Thailand, "One Million Trees for the King's Project" (28 September 2010), online: PTT International <<http://www.ptt-international.com/en/news/activities-in.aspx?newid=UIRqIUAhx1s%63D>>; "Investigation of Corruption in the Forest Plantation Project" (in Thai), *Bangkok Business News* (18 February 2011), online: Bangkok Biz News <http://www.bangkokbiznews.com/2011/02/18/news_32472393.php?news_id=32472393>.

¹⁹ Interview with Chaiya, *supra* note 1.

²⁰ *Land Code*, Royal Thai Government Gazette 71:78 (30 November 1954), s. 2.

²¹ *Civil and Commercial Code*, Royal Thai Government Gazette 196:42 (8 April 1992), c. 4, s. 1304.

²² Interview with Chaiya, *supra* note 1.

²³ *Ibid.*

²⁴ *Ibid.*

5.1.1.4 Law Enforcement Manipulated by Politics

Law depends on the policy of governments and politicians who take control over a ministry office, in this case the Ministry of Natural Resources and Environment of Thailand. Management of natural resources is a gold mine for politicians as well as part of their election propaganda,²⁵ because natural resources are in the public domain, and there are no large powerful groups of lobbyists like business groups and factories, only environmentalists and hill tribes who live in the forest.

The government organization that has direct authority over the forest is the Ministry of Natural Resource Management and Environment (MNRE), which was founded on October 3, 2002.²⁶ The MNRE was originally an environmental agency in the Ministry of Sciences and Technology; then the MNRE was merged with the RFD and DNWP, which were originally part of the Ministry of Agriculture and Cooperatives. Three main political parties, the Democratic Party, the Thai Charter Party, and the Social Action Party, have ruled this ministry for decades.²⁷ The Ministry of Natural Resources and Environment is a “free meal” for people who exploit natural resources as if they are using “free land” for resort businesses or for summer houses for the rich.²⁸ However, when a person occupies forest land, the RFD and the DNWP find the trespasser and take the forest land back immediately. Meanwhile, the government budget for CFM is also one of the resources that politicians and government agencies can benefit from, such as forest plantation and forest fire prevention budgets.²⁹ This is from the

²⁵ *Ibid.*

²⁶ *Departmental and Government Agency Improvement and Administrative Reorganization Act 2002*, Royal Thai Government Gazette, 119: 99 (2 October 2002) [*Administrative Reorganization Act*].

²⁷ The main ministries that are popular among politicians and bargained for among political parties are the Ministry of the Interior, Ministry of Education, Ministry of Finance, Ministry of Transport, Ministry of Agricultural Cooperatives, and the Ministry of Natural Resources and Environment. This does not even include the Ministry of Defence, because the minister almost always comes from the military. One reason for the popularity of these ministries is the size of their budgets. The Ministry of Natural Resources and Environment is among those with the highest expenditures; see Budget Bureau, “Thailand’s Budget in Brief, Fiscal Year 2011” (Bangkok: P.A. Living, 2011), online: Budget Bureau, Government of Thailand <<http://www.bb.go.th/FILEROOM/CABBBIWEBFORMENG/DRAWER14/GENERAL/DATA0000/00000025.PDF>>; *Annual Government Statement of Expenditure 2011*, Royal Thai Government Gazette 127:60 a (28 September 2011); “Government Budget in 2010: the Top Three Ministries” (in Thai), *Bangkok Business News* (10 June 2009), online: Bangkok Biz News <<http://www.bangkokbiznews.com/home/detail/politics/policy>>.

²⁸ Interview with Chaiya, *supra* note 1.

²⁹ *Ibid.*

supply side, when government agencies play the role of protectors of the public good. The RFD is a provider for ecosystem conservation and functional natural resource management.

At the same time, politicians create government policy according to public pressure in order to gain popularity.³⁰ This comes from the demand side, from the people as consumers of the country's political agendas.³¹ From my observation, there are two kinds of demands that affect CFM. The first kind pushes CFM forward. Examples include the people's demand that the government resolve the problems of the poor and of landless farmers calling for land reform, and of indigenous peoples relying on their rights to prevent relocation. The ruling political party tries to gain the favour of the people by enacting laws about community land title and drafting documents about land, such as Sor Por Kor 4-01, that give away or degrade forest areas.

The second pressure on CFM comes from environmentalists and international organizations like UNEP. Pressure groups such as the middle class and senators also manipulate the law and, for example, blocked the *Community Forest Bill*. Similarly, in the case on natural resource management conflicts in Chom Thong,³² environmentalists' groups tried to remove the hill tribes from the forest area.

Reacting to pressure on both sides, politicians as policy makers influence how the RFD enforces the law on CFM, especially the CFM of the villages located inside PAs.³³ When villagers exercise their CFM effectively, the government allows them to stay and practice CFM. Happily, RFD officers no longer regularly arrest villagers for trespassing in forest areas. However, when environmentalists put pressure on the government, RFD officers are compelled to arrest villagers for forest trespassing and this is followed by the relocation of some villages.

5.1.1.5 Protective Law Enforcement and Problematic Organization

Law enforcement can be very protective and related to loyalty to the organization. Because of the benefits of administering the forest, such as budget grants and power over

³⁰ *Ibid.*

³¹ This concept is adapted from macroeconomic theory, which divides all products in society into four categories. See Rangsan Thanapornpan, Thai professor of economics, who compares the *Constitution* to a product in the market. Also see Nidhi Eoseewong on the concept of implementing the "cultural constitution"; see Chapter 6, section 6.2.2.3, below, for more discussion on this topic.

³² Interview with Chaiya, *supra* note 1.

³³ CFM may be practised by villagers who live outside PAs, but who preserve and utilize the forest near their villages, and CFM may also be practised by villagers who live in PAs.

forest lands,³⁴ RFD officers can be very possessive about “their” forest territories. RFD officers do not want to transfer their power to other government agencies or to villagers in the form of participation. As well, they think that CFM compromises the RFD’s power over forest lands. Therefore, RFD officers often use state forest laws to restrict CFM, while they do not uphold constitutional rights to practise CFM, as there is no supplementary statute governing it.

The RFD’s authority is competitive with the authority of the DNWP and provincial natural resource management of forest areas. To provide some background, government organization comes from administrative law,³⁵ which establishes the ministries and their authorities. This law has to be reformed every 10 years.³⁶ The problem began when the last administrative reform regarding forest conservation separated the National Park Division from the RFD to be the DNWP and formed the Department of Watershed Management and the Department of Natural Resources on the Coastline, which created a fragmented structure and difficulties with working as a unit in forest areas. There are overlaps of responsibility for forest areas among the RFD, DNWP, the Watershed Management Department and the provincial Department of Natural Resource Management.³⁷

Both possession of power and organizational restructuring have affected the enforcement of laws that allow for people’s participation in CFM.

5.1.2 Forest Reserve Officers

The RFD is the government agency that deals with the CFM in general, because both the government and the villagers agreed to allow CFM in forest areas, especially in degraded forest areas. However, from the RFD officers’ point of view, there are some concerns about law enforcement and CFM that cause the RFD officers to be reluctant to fully protect the community rights of the people to practise CFM. The challenges from the RFD officers’ perspective are: lack of guidelines for monitoring CFM; overlapping jurisdiction of government

³⁴ Interview with Chaiya, *supra* note 1

³⁵ *Administrative Reorganization Act*, *supra* note 26; see also the website of the Ministry of Natural Resources and Environment, online: Ministry of Natural Resources and Environment, Government of Thailand <<http://warehouse.mnre.go.th/dnn/AboutMinistry/OrganizationInfo/tabid/423/Default.aspx>>.

³⁶ The Thai government has a concept that reorganization of government agencies every 10 years would help to improve and develop the administrative function. Normally, the administration tends to be overblown and burdened by red tape; thus, the Thai government should be reformed to perform more effectively – a reason for enacting the *Administrative Reorganization Act*.

³⁷ Interview with Chaiya, *supra* note 1; see section 5.1.2.3 on related issues.

agencies; conflicting concepts of community land title; liability for complying with the law; and difficulties in following government policy.

5.1.2.1 No Guidelines for Monitoring the Villagers' CFM

Currently, there is no statute that governs the CFM that the villagers regulate themselves, which is different from the CFM that the Community Forest Management Bureau established under the *Forest Act* and the *National Forest Reserve Act*. Although the *Constitution of 2007*³⁸ states that community rights can be directly enforced without referring to an external statute,³⁹ the RFD officers who have to comply with the forestry laws are reluctant to allow any activity that is “against” their forestry laws. There are no guidelines for the officers who work on-site to follow and protect themselves from allegations of negligence.⁴⁰ During the time that the *Community Forest Bill* was in force, before its abolishment by the Constitutional Court, both opponent and proponent groups had some ideas about how CFM should be directed. As government officers, RFD officers hope to have clear statutory guidelines that they can rely on when they do their duty.

5.1.2.2 Obligation to Enforce the Forestry Laws

Under the *Forest Act* and the *National Forest Reserve Act*, RFD officers have the responsibility to protect the forest⁴¹ from anyone who causes any harm to trees or biodiversity in the forest area. The *Penal Code* prescribes penalties for government officers who neglect to

³⁸ *Constitution of the Kingdom of Thailand 2007*, trans. by International Foundation for Electoral System-Thailand and the Political Section and Public Diplomacy Office of the US Embassy-Bangkok, Royal Thai Government Gazette 124:47 (24 August 2007), s. 28, para. 3.

³⁹ See Chapter 6 about the sources of law and the authority/hierarchy of law. According to Thai positivist textbooks, government officers need to have a source of power to enforce the law (public law). Also, CFM needs a source of law to provide authority – which is the *Constitution*. Note that administrative law is a source of authority for local governments in that it allows them to enact regulations. This leads to a contest between CFM regulations and state forestry law: in theory, which one has the priority? In practice, sometimes CFM is enforced by the local government, but sometimes state forestry law also uses CFM regulations. This is living law of the government officers and the communities.

⁴⁰ Interview with Chaiya, *supra* note 1; *Penal Code*, Royal Thai Government Gazette 73:95 (15 November 1956), s. 157.

⁴¹ *Administrative Reorganization Act*, *supra* note 26, s.2.

perform their legal duties.⁴² Therefore, RFD officers always keep in mind that their main responsibility is protecting the forest.⁴³

Moreover, when villagers draft CFM regulations that contradict regulations enacted pursuant to Thai statutes, RFD officers cannot approve these regulations.⁴⁴ For example, there are village regulations that allow villagers to cut trees from their CFM forest use areas where forest land has been protected due to gazetting. Under the villagers' regulations, a CFM committee can grant its approval to cut trees for household use. In contrast, national forestry laws strictly prohibit cutting trees even for household consumption, and the penalty for this violation is higher than that in the villagers' regulations.⁴⁵ Therefore, villagers are not supposed to draft their own regulations providing an exception to the criminal penalty that is established by the *Forest Act*. This CFM regulation enforcement issue creates practical dilemmas for RFD officers.

5.1.2.3 Overlapping Powers of Government Forest Agencies

Similar to the opinion of the officer from the Academic Unit in the DNWP, RFD officers think that reorganization within the Ministry of Natural Resources and Environment causes problems for law enforcement, including enforcement of CFM.⁴⁶ Under the *Administrative Reorganization Act*,⁴⁷ the Ministry of Natural Resources and Environment has created too many departments which have authority over forest areas: the RFD, the DNWP, the Natural Coastal Resources Department, and the Water Resources Department.

Moreover, at the provincial level, the Ministry of Natural Resources and Environment has provincial branches and they have authority over the natural resources in each province. There are no RFD offices at the district level, while the RFD still has responsibility over the forest areas there.⁴⁸ Therefore, the RFD cannot participate closely with the local people in forest

⁴² *Penal Code*, *supra* note 40, s.157.

⁴³ Interview with Khampon, RFD officer (17 October 2010).

⁴⁴ *Ibid.*

⁴⁵ *Forest Act 1941*, Royal Thai Government Gazette 58 (15 October 1941) 1417, s. 73 [*Forest Act*].

⁴⁶ Interview with Khampon, *supra* note 43.

⁴⁷ *Administrative Reorganization Act*, *supra* note 26, s. 23.

⁴⁸ Interview with Khampon, *supra* note 43.

conservation and grant permissions concerning forest areas. This makes cooperation between CFM practitioners and the government weak and inefficient.⁴⁹

5.1.2.4 Law Enforcement Policy

For the RFD officers who work in the field as direct law enforcement agents, the government policy allowing the people who live in degraded forest areas to register their claims was designed to reduce law enforcement conflicts and allow for more public participation in CFM. This policy was created by the so-called “Cabinet Resolution” in April 1997 – *Wang Nam Khieo*⁵⁰ – to resolve the problem of landless farmers trespassing in forest areas.⁵¹ Instead of arresting the villagers who live in the forest for trespassing or criminal negligence, this Cabinet Resolution gives RFD officers more room to use their discretion and cooperate with the villagers who are trying to exercise their own independent CFM.⁵²

However, the Cabinet Resolution also creates new problems for law enforcement. There are four steps in the process under the Cabinet Resolution for resolving land problems. The first step is for a person who lived on the land before it became a forest area to come forward and register his or her claim at the District office. Then, the District office will provide a document showing that this person has claimed that he or she lived on the land previously. The second step is to survey and prove the claim. The last step is approval. After it is proved that the person lived on this land and had legitimate rights before the land became a forest area, the RFD will issue a document stating the person is entitled to the land he or she currently occupies.⁵³

In practice, however, the Cabinet Resolution rarely grants approvals of occupancy to people who live in the forest. Problems mainly arise during the first and the second steps of the

⁴⁹ *Ibid.*

⁵⁰ *Cabinet Resolution to Resolve the Problem of Landless Farmers and Trespassing in Forest Areas* (17, 22 and 29 April 1997), online: Government of Thailand <http://www.cabinet.thaigov.go.th/cc_main21.htm> [Cabinet Resolution].

⁵¹ Interview with Khampon, *supra* note 43.

⁵² The term “people’s” means that the form of CFM was created by the people themselves, and excluded from the government CFM that is registered through the Community Forest Division.

⁵³ The document will only refer to land that is currently occupied. This means that the government will only allow people to live on and cultivate in the forest area they are currently using, not in the whole area used for crop rotation according to the Karen tradition. Karen people may have up to seven pieces of land for use in rotation cultivation.

claims process. Regarding the first step, there are many false claims⁵⁴ because the requirement is only to report to the District office; no one can know whether a report is valid until they come to the second step.⁵⁵ The claim document, because it is issued by the District office, can be used in court until it is proved in the second step. The situation gets worse in the second step because the government does not have enough money for surveys to prove whether a person lives in the area claimed.⁵⁶ In addition, people often do not want to have their lands surveyed because they are afraid of eviction if their evidence of settlement⁵⁷ is not proved conclusively enough.⁵⁸ Hence, in general, the Cabinet Resolution only compromises law enforcement and is not the final solution. Further, it is a policy that can be reversed at any time, depending on the politics of the pressure group.

5.1.2.5 Unfit Community Land Title

RFD officers do not agree with the community land title policy because it is not suited to the tradition of the people who live in and preserve the forest.⁵⁹ Community land title in forest areas only relates to the land that the forest people currently live on and cultivate. Therefore, community land title does not suit the Karen tradition in which people normally practise rotation cultivation. Thus, RFD officers do not think that community land title will help to strengthen forest conservation.⁶⁰

5.1.2.6 Support for Genuine CFM

In practice, RFD officers know the villagers who live in the forest area and do not prevent them from staying, as long as they live normally, and do not light forest fires or occupy additional forest areas. When RFD officers patrol forest areas, they know when these areas

⁵⁴ For example, a person who registers a claim might not really live in that area but receives money from a business person as a proxy or agent. Sometimes this has resulted in the total area of land claimed in one province being bigger than the whole area of that province.

⁵⁵ Interview with Khampon, *supra* note 43.

⁵⁶ *Ibid.*

⁵⁷ For example, an old tree near a claimant's house may show that his or her ancestor planted the tree.

⁵⁸ Interview with Khampon, *supra* note 43

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

have been trespassed on.⁶¹ Moreover, RFD officers try to encourage the people who live in or near the forest to protect the forest and to help to make fire breaks in the forest area.

What RFD officers cannot accept is any expansion by villagers into new forest areas.⁶² Also, RFD officers know their limits, and know that they need villagers to participate in forest conservation.⁶³ Therefore, RFD officers want to support the kinds of CFM that really help preserve the forest, such as the CFM practised by Karen communities. RFD officers would prefer having the *Community Forest Bill* or a similar statute to provide guidelines for their work.

5.1.2.7 Adaptable Forestry Laws

As direct law enforcers, RFD officers think that the current forestry laws are good enough for handling the function of the RFD. These laws have been in place for a long time, but they still cover all current duties of the RFD.⁶⁴ In their view, the only aspect of the laws that should be improved is the amount of penalties. They argue that these should be higher because of inflation, otherwise people will be fined based on the value of money 50 years ago (depending on the statute) which, these days, will not effectively deter them from violating the law.⁶⁵

5.1.3 National Park Officers

A controversial debate among government agents, environmentalists and forest people surrounds the issue of CFM located in PAs such as national parks and wildlife sanctuaries. The main government agency that has authority in this type of PA is the Department of National Parks, Wildlife, and Plant Conservation (DNWP).⁶⁶

5.1.3.1 Relationships between DNWP Officers and Villagers

In forest conservation, DNWP officers need cooperation from the people,⁶⁷ and CFM is one of the ways to get people's participation in forest conservation.⁶⁸ For instance, during the

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *National Park Act 1961*, Royal Thai Government Gazette 78:80 (3 October 1961) 1071/3 [*National Park Act*].

⁶⁷ Interview with Pramot, DNWP officer (8 November 2010).

conflict over natural resources in 2003, when villagers protested among the lowlanders and the hill tribes in the southern mountainous area of Chiang Mai, DNWP officers arranged a talk with both sides and made a pact with the villagers to manage the forest.⁶⁹ In general, relationships between DNWP officers and villagers were difficult at first before the parties adjusted themselves to cooperating on the issue of forest conservation. The parties both knew that they needed to cooperate; otherwise they would not succeed in forest management. They wanted to avoid situations in which villagers were arrested or national park offices were burned.⁷⁰

From the villagers' perspective, the problem is that the government tries to take away their ancestral land, the land they lived on before it was gazetted. The solution is to find out who takes precedence, the villagers or the gazetted forest. According to the Cabinet Resolution of April 1997, prosecutions against people who live in the forest should be delayed until they can prove their possession is legitimate; however, a problem with this process is inconsistency.⁷¹ The Cabinet Resolution resulted from the people's movement demanding that the government resolve poverty, landlessness of farmers and forced relocation of forest dwellers, not just promote the politicians' election agenda. After 13 years of the same political party who controlled this ministry when the Cabinet Resolution was drafted, nothing much has been done to follow up the resolution; meanwhile, trespassing continues to increase.⁷² However, for DNWP officers, the bottom line in enforcing the law is to respect the legitimate rights of the people who truly lived in the forest before the land became PAs. If they are truly forest people, the DNWP will work out an agreement with them on forest conservation. The most important element of enforcement is preventing further forest trespassing.⁷³

⁶⁸ *Ibid.* This is the opinion of officers who are known as being able to "successfully" cooperate with and "understand" villagers.

⁶⁹ Interview with Manop, DNWP officer (25 November 2010).

⁷⁰ See these news articles on violence against the national park office and community: "Burning of the National Park Office in Kanjanapuri" (in Thai) *Daily News* (24 February 2012); "Hmong Took Hostage Forest Rangers from Umpang Wildlife Sanctuary" (in Thai) *INN News* (18 March 2012); "Burning of Karen Houses in Suan Pung" (in Thai) *KawSod News* (30 March 2012); "Forest Rangers Tear Down Community Bridge in National Park to Block Communal Land Title" (in Thai) *Prachatai News* (7 April 2012).

⁷¹ Interview with Manop, *supra* note 69.

⁷² Interview with Pramot, *supra* note 67.

⁷³ *Ibid.*

During the process of gazetting Maetakhrai National Park, people resisted the creation of the park, because it overlapped their village and their forest use areas.⁷⁴ At first, the relationship between the DNWP officers and the villagers was very negative. After a few villagers were arrested for trespassing in the new national park, DNWP officers rarely accessed the village because the villagers were furious. Officers were removed from the area and were replaced by new officers, who deliberately re-connected with the villagers.⁷⁵ The DNWP officers provided a forest conservation training program for the villagers, cooperation on forest fire prevention and a camping program for the youth from the villages in the area of the national park. The villagers conduct their own CFM according to their own regulations, but if a situation is beyond their control (e.g. there are local mafia in the community who illegally cut trees), the villagers will ask for assistance from DNWP officers.⁷⁶

The main factor in strong and successful villagers' CFM is a strong and successful leader.⁷⁷ There are two kinds of leaders: formal leaders, including elected village headmen; and informal leaders, including respected elders. As continuity of leadership is often uncertain, DNWP officers often assist villagers when needed.⁷⁸ To illustrate, in Ban Maetha, the CFM committee asked DNWP officers to help when one of the headmen in their subdistrict violated their CFM regulations by logging illegally. This happened when a lumber business owner got elected and became the headman. Although some of the villagers who participated in CFM were not satisfied with the election results, they had to follow the rules. Finally, after the headman was arrested by the DNWP officers and the police, the villagers elected a new headman and the CFM situation eventually got better.⁷⁹

5.1.3.2 Enforcement of the Living Law: State Law and the Law of the Commons

When people become aware that their land is slated to become a national park under the *National Park Act*, they are typically afraid of this law, because it is very strict. They know they will not be able to use the forest as they did in the past by, for example, collecting forest

⁷⁴ The area that was planned for the national park has been reduced from 700,000 to 200,000 rai. Maetakhrai National Park is still being operated unofficially.

⁷⁵ Interview with Manop, *supra* note 69.

⁷⁶ *Ibid.*

⁷⁷ Interview with Pramot, *supra* note 67.

⁷⁸ Interview with Manop, *supra* note 69.

⁷⁹ *Ibid.*

products like mushrooms and bamboo shoots. Therefore, to reduce people's resistance, the law is not fully enforced. A reason for this compromise is to gain the trust of the people and hope that they will cooperate with the government's goals of forest preservation.⁸⁰ The main objective of the law is to preserve forested lands and trees. Harmful activities that DNWP officers cannot allow are clear cutting and lighting forest fires

The current principle of government conservation policy is participation by the people. DNWP officers use the regulation agreed to by all villages in the area of the national park.⁸¹ In practice, the villagers' regulations are more strictly enforced than the state law because the villagers have committed themselves to their regulations and it is harder for them to ignore their own rules. Moreover, if the villagers break their commitment, DNWP officers will call for a meeting among the villages to consult and enforce the regulations. When the DNWP arranges this kind of meeting, the network of villages will come together and put more pressure on the violating village. The network works like a watch dog and an enforcer at the same time. This community-based system works very well in rural areas. If the violation continues, DNWP officers will enforce the state forestry law, which contains greater sanctions. In general, meetings between villagers and the DNWP officers go smoothly, but there are still a few violations that have to be prosecuted under state forestry law, in this case the *National Park Act*.⁸²

5.1.3.3 CFM as "No Further" Trespassing

One of the main issues in law enforcement is trespassing, while another issue is the use of forest products such as mushrooms and ants' eggs. After cooperating with the people's CFM, there can be no further expansion of occupied lands into forest areas.⁸³ In some areas such as Karen villages, DNWP officers negotiate to stop villagers from practising rotation cultivation and to introduce agro-forestry; this helps with reforestation to some degree. Ban Khunte is an example. In the CFM forest use area, villagers plant coffee in the shade between trees, which has proved to be productive and to provide a good living. However, to be realistic, it is hardly possible to regain the richness of the forest as it used to be, but at least we can preserve the

⁸⁰ Interview with Pramot, *supra* note 67.

⁸¹ *Ibid.*

⁸² *Ibid.*; see *supra* note 66, s. 16.

⁸³ Interview with Pramot, *supra* note 67.

forest as it is now, without further deforestation. Although CFM cannot completely recover the fertile forest, at least villagers and the state have created alliances that can help increase forest preservation.⁸⁴

5.1.3.4 Claiming Cooperation as Policy/ Knowing It Is “Illegal”; Policy as Living Law

Technically, the villagers’ regulation of their CFM is illegal according to Thai forestry law.⁸⁵ Also, by law, no-one can occupy forest areas which have been surveyed and mapped by villagers using GPS. Therefore, DNWP officers cannot approve of these actions. However, the regulations created by DNWP officers and villagers and the natural resource management agreements that state that villagers will not expand into forest areas can be treated as policy. According to the Cabinet Resolution of April 1997, villagers who lived in forest areas before such areas were gazetted as park lands can legitimately claim rights to live in their traditional lands while they are being converted to park lands. In addition, the Director General of the DNWP can use his discretion to determine whether to allow anyone to live in or utilize the forest in national parks.⁸⁶

In practice, a head of a national park is a key person who applies both the living law and state law. He or she directly cooperates with the villagers’ CFM as living law. In contrast, when villagers violate the regulations that they have made collectively or when a situation goes beyond the villagers’ control, the head of a national park will apply the state law. In the villagers’ view, he/she is an officer who “understands” the life and culture of the villagers.

Another factor in successful CFM cooperation between DNWP officers and villagers is the character of the villages themselves. Not every village can practise CFM successfully; only strong communities can sustain CFM and DNWP officers have to encourage and support this potential when they see it.⁸⁷ The villages in the case studies selected for this dissertation are not typical villages; they differ especially from those Hmong communities that are highly

⁸⁴ *Ibid.*

⁸⁵ For example, the villagers can get permission from the CFM committee to use timber products from the forest, while state forestry law, i.e. the *National Park Act*, does not allow anyone to cut or cause any harm to trees.

⁸⁶ *National Park Act*, *supra* note 66, s. 19.

⁸⁷ Interview with Pramot, *supra* note 67.

commercialized and rarely claim subsistence CFM.⁸⁸ In such cases, DNWP officers have to enforce the law as usual.

5.1.3.5 Individual Style Becomes Irreversible Tradition

The success of cooperation with villagers' CFM also depends on whether national park heads "understand" the culture of the villagers and their CFM practices. If the head of a national park does not "understand" the villagers, the villagers might protest and the head could be transferred or might stay uncomfortably in office. However, if a national park head who manages to cooperate with village CFM has to retire or is promoted, the new head is obligated to fulfill the commitments made by the previous head.⁸⁹ The key is to understand the principal objective of the law, which is forest conservation, and to implement the law accordingly.⁹⁰ Sometimes, we have to overlook some details to achieve the main objective.⁹¹ If villagers are allowed to use the forest, they will preserve it for themselves.

5.1.4 Community Forest Management Bureau Officers

One of the RFD's duties is to support and develop forest management. To fulfill that duty, the RFD established the Community Forest Management Bureau (CFMB) to promote the community forest.

5.1.4.1 Three Kinds of CFM

Officers from the Community Forest Management Bureau (CFMB) categorize CFM into three types depending on the approach that the village used when it first implemented its CFM.⁹² These types are 1) traditional community CFM; 2) NGO-supported CFM; and 3) CFMB-supported CFM.

⁸⁸ *Ibid.* See also Waranoot Tungitiplakorn & Philip Dearden, "Hunting and Wildlife Use in Some Hmong Communities in Northern Thailand" (2002) 50:1 The Natural History Bulletin of the Siam Society 57.

⁸⁹ Interview with Pramot, *supra* note 67.

⁹⁰ *Ibid.*

⁹¹ For example, by letting the villagers collect mushrooms and non-timber products so that they maintain and nurse the forest. See Tungitiplakorn & Dearden, *supra* note 88.

⁹² Interview with Prajak, Community Forest Bureau officer (25 November 2010).

Those traditional communities that practised CFM for a long time before the emergence of the public image of CFM in the mid-1990s are encouraged by CFMB officers to register with their division because such villages have traditions that can help to sustain forest conservation.

The second type of CFM is the kind for which villagers receive advice and support from NGOs, although these NGOs often have conflicts with the RFD.⁹³ Such conflicts mainly arise from the debate over CFM in PAs, which the RFD strongly opposes. Regulations created in relation to this kind of CFM include regulations that allow people to cut trees for household consumption after requesting permission from their CFM committee; these kinds of regulations are often contrary to Thai forestry law.⁹⁴

The last type of CFM is the CFM that the RFD endorses by its registration system under the *National Forest Reserve Act*. According to this system, the Director General of the RFD can order officers to undertake any activity in forest reservation areas, as long as its goal is forest conservation.⁹⁵ As a result, the RFD established the CFMB to support the people's participation in forest conservation. Hence, some forms of CFM come under the RFD's authority; in these cases, villagers can come to the CFMB and register their CFM.⁹⁶

5.1.4.2 Registering to Build CFM

Under the CFMB regulations, 50 community members, together with the consent of their headman, can apply to register their CFM with the CFMB.⁹⁷ The community applying can be an old village whose residents have practised CFM on their own initiative for a long time, or a new village that has become interested in CFM only after learning that the CFMB has announced a project. After the registration process, the CFMB has a monitoring system to oversee CFM and villagers have to re-submit their applications every five years. Villagers receive support from the CFMB such as budgets and CFM training.⁹⁸ According to the CFMB, a community practising

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *National Forest Reserve Act*, *supra* note 12, s. 19.

⁹⁶ According to the CFMB databases in February 2011, the CFMB approved the CFM of approximately 8,406 villages in 7,756 projects, covering an area of 5,130 km. See Community Forest Management Bureau, *Instruction Manual for Community Forest Management Project* (Bangkok: Royal Forest Department, 2011), online: Community Forest Management Bureau <http://www.forest.go.th/community_forest/images/stories/file/User_Manual_cmfoos.pdf>

⁹⁷ Interview with Prajak, *supra* note 92.

⁹⁸ *Ibid.*

CFM does not need to be a traditional community. The main objective is to increase community participation in forest conservation. When a village finishes the five-year program, members will receive a certificate to show that they belong to a community that practises CFM.

However, this approach has a significant limitation.⁹⁹ Due to government budget restraints, the CFMB can only allow a limited number of villages to register. In a regional branch of the CFMB, each province can have only 10 CFM approvals, under a budget of around \$52,100 CAD (e.g. this was the budget in 2009-2010).¹⁰⁰ Further, the monitoring system requires close attention, so the CFMB has the potential to eventually begin CFM projects. Hopefully, the communities that have passed through the program will maintain the concept of conservation and still participate in CFM by themselves while the CFMB trains new communities. Ultimately, the goal is to have more CFM communities with a conservationist spirit. Government funding is an incentive for villages to practise CFM within the CFMB's program; hopefully, with this funding, villagers can derive more benefits from forest conservation.¹⁰¹

5.1.4.3 Law Enforcement Concerning CFM

For CFM not being monitored by the CFMB, there are no clear directions and guidelines.¹⁰² Even though the *Constitution* guarantees community rights, it does not contain enough detail for the officers to enforce it. The most important issue is the definition of "management" – how can the villagers use the forest in a sustainable way? The subsistence way of living such as collecting mushrooms is viewed as being outdated.¹⁰³ Actually, provisions in the *Forest Act* and the *National Forest Reserve Act* on CFM allow people to participate in forest conservation, as long as it is outside PAs such as national parks and headwater areas. Thus, the RFD can cover all activities.

A major problem in forest lands is trespassing and then selling land to other people.¹⁰⁴ Later, this forest land may be transferred to commercial occupants such as resort owners and

⁹⁹ *Ibid.*

¹⁰⁰ *Annual Report of the Community Forest Management Bureau, Region 1* (Chiang Mai, 2010).

¹⁰¹ Interview with Prajak, *supra* note 92.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

farmers.¹⁰⁵ This situation may be more severe when combined with the land title system. There are not enough patrol officers to prevent trespassing.¹⁰⁶ Sometimes written laws cannot be enforced.¹⁰⁷ Most of the time, law enforcement depends on the people who enforce it.

5.1.4.4 Factors in Successful CFM

After monitoring their practice of CFM, communities often develop more concern about the forest. For example, this is shown by a reduction in the number of forest fires in the CFM area.¹⁰⁸ An important factor in the success of CFM is the influence of community leaders.¹⁰⁹ A community depends on its leader and the interest of the leader will encourage the community to participate in forest conservation. However, conservation that can draw the support of villagers needs to show a direct benefit in return.¹¹⁰ So far, the CFM system that the Community Forest Management Bureau has established often reflects problems of continuity when community leadership changes.¹¹¹

Different ethnic groups have different characteristics and cultures that shape their CFM – and its success – as well.¹¹² For example, the Hmong tend to be commercially oriented¹¹³ in their community management, including their “CFM”. Therefore, supports and incentives for each community should be designed to serve the needs of that community so that they can practise conservation in their own way.

¹⁰⁵ There was an incident in which an investor hired approximately 50 villagers from the northeastern region and transported them to a forest area in the south of Chiang Mai. The investor then started to clearcut the trees in this forest area, then planted large trees, intending to make it look like a village had been established in that area for a period of time, in order to claim rights over this forest land. The investor was charged and the case is still being heard in Chiang Mai Provincial Court. The case is known as the *Kilo 5* case (or the “fifth kilometre”) based on the area where the trespassing occurred.

¹⁰⁶ Interview with Prajak, *supra* note 92

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ Chusak Wittayapak & Philip Dearden, “Decision-Making Arrangements in Community-Based Watershed Management in Northern Thailand” (1999) 12:7 *Society & Natural Resources* 673.

¹¹⁰ Waranoot Tungittiplakorn, *Highland Cash Crop Development and Biodiversity Conservation: The Hmong in Northern Thailand* (Ph.D. Dissertation, Department of Geography, University of Victoria, 1998) [unpublished].

¹¹¹ Interview with Prajak, *supra* note 92.

¹¹² *Ibid.*

¹¹³ Recently, a large agriculture company gave Hmong villagers free corn seeds and free fertilizer and bought the corn when it was harvested. *Ibid.*

5.1.5 Lessons Learned from Government Officers

The government officers who work directly with CFM know that there is living law in the forest, but they still respect their own state forestry law. Government officers are the ones who enforce both the law in the field that they use to interact with villagers and environmentalists, and the state law that provides them with direct authority. They also exercise their power by using state law to deal with violators of state forestry laws. It seems that government officers apply the living law or folk law in everyday life as a soft tool, but when they face a challenging situation then they apply the “hard” state law.

One missing piece in law enforcement by government officers is the implementation of the *Constitution*. The *Constitution* is an object which is far removed from the government officers’ reality. They use the law that is closest to them first: forestry law and then the Cabinet Resolution. Even though the Cabinet Resolution is an internal order of the executive branch, it provides government officers with an excuse to apply the living law, which is more flexible and thus more useful to them in managing forest conservation.

Finally, government officers realize that CFM is important in fulfilling their work in forest conservation. Therefore, they need to cooperate with villagers. The task of the officers is to determine how to conduct CFM in an appropriate way and to balance CFM and their responsibilities within the law. Wildlife is less focused on in this area since many species are long gone; however, when I asked villagers from three selected communities about animals that remained in their forests, they mentioned wild boars and various kinds of birds. For now, it seems that the main task of the officers is to first stop forest trespassing, then collaborate with the villagers concerning wildlife conservation.

5.2 Lawyers’ Point of View

Lawyers in this group defend villagers in court¹¹⁴ and include general barristers and human rights advocates from the Lawyers’ Council of Thailand who have sympathy with the villagers and their CFM.

¹¹⁴ In Thailand, lawyers who can defend cases in the Courts of Justice (from the District Court level to the Supreme Court level) are required to register with the Lawyers’ Council of Thailand. *Lawyers Council Act 1985*, Royal Thai Government Gazette 102: 129 (19 September 1985).

5.2.1.1 The Cost of Justice: Time, Money and Knowledge

It is very difficult for villagers to attend court because of lack of money.¹¹⁵ Most villagers who are arrested for violating forestry laws due to practising CFM are the main breadwinners for their families.¹¹⁶ The villagers who are convicted need money or a person who can post bail for them, otherwise they will have to stay in prison until their trials are completed. In addition, the law requires confiscation of anything used to commit a crime. For example, in the *Pati Ming* case, the defendant's truck was seized until the court rendered its decision. During the trial, which lasted for two years, Pati Ming and his family did not have a vehicle to use for their daily transportation or cultivation.¹¹⁷ If Pati Ming had pled guilty, his case would have been resolved earlier. However, he decided to plead not guilty and thus spent a great deal of time attempting to prove that practising CFM is a right and is guaranteed by the *Constitution*.¹¹⁸ This effort was expensive as well as time-consuming.

Actually, there is nothing legally wrong with the concept of seizing something related to a crime. Even the villagers in Ban Huaieikhang think of power saws as evil tools and will not allow anyone in their village to possess them. However, there is a fine line between the case of the poor who fight for their constitutional rights and participation in forest conservation and the crime of illegal forest trespassing or deforestation and violation of the next generation's rights. The difference can be easily observed when one goes to the actual site of the "crime" and investigates thoroughly, but it is extremely rare for judges to do that.¹¹⁹ Normally, evidence heard in court comes from public prosecutors and defence lawyers. It is constructed to appeal, and is biased according to the positions of the parties.¹²⁰ Therefore, it is constructed justice. Knowledge is important, both for the persons who come to court to protect their rights, and also for the court, so that the court can understand how things work in the field.

If the people do not have these three components – time, money, and knowledge – they will be unlikely to gain the justice that they are seeking.

¹¹⁵ Interview with Salee, lawyer in Chiang Mai (20 October 2010).

¹¹⁶ Interview with Direk, human rights lawyer in Chiang Mai (13 October 2010).

¹¹⁷ Memorandum from Case No. 3860/44, Chiang Mai Provincial Court (2001).

¹¹⁸ Interview with Direk, *supra* note 116.

¹¹⁹ *Ibid.*

¹²⁰ Interview with Salee, *supra* note 115.

5.2.1.2 Old Fashioned Law Enforcement

Although the law has changed, the legal concepts of the enforcers have not changed.¹²¹ For example, the *Constitution* contains new ideas about community rights; the drafters tried to create a legal mechanism for direct application of constitutional rights even though these might not be supported by statutory law. However, in practice, lawyers do not really apply the *Constitution* directly.¹²² Drafters can only change the law – they cannot change the legal culture familiar to lawyers.

CFM is still new to lawyers, compared to the criminal, civil and commercial laws that are based on long-held theories, explanations and implementation and are now fundamental to the Thai legal system.¹²³ Ten years ago, CFM was known only among people who were involved with the forest. There are still no solid legal concepts to apply. CFM is only practiced by some communities and it cannot even be applied as customary law because it is varied and fluid.¹²⁴

Specifically, the application of CFM is not defined or detailed in a statute. Lawyers cannot apply local regulations that conflict with state forestry law.¹²⁵ Moreover, environmental law is higher-level law and more widespread than the villagers' regulations, which are practised and enforced in limited areas only.¹²⁶ Therefore, lawyers have to prioritize the application of forestry law and environmental law over the application of CFM regulations.

5.2.1.3 Reconstruction of Ecological Justice

Some lawyers believe that humans cannot live together with the forest and still preserve biodiversity, because they see deforestation in everyday life. In contrast, other lawyers work for the forest people and forest conservation and try to reverse the prejudice against CFM practices. To win a case concerning CFM would be to reverse the fundamental legal culture of Thai legal system. This culture needs a new set of knowledge.¹²⁷ For example, recent anthropological research shows that rotation cultivation helps to re-grow the forest better than

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Interview with Direk, *supra* note 116.

static plantations.¹²⁸ Another example is the intention to change the public stigma associated with hill tribes by using “new” words. Social science scholars introduced the word “rotation cultivation” to replace “shifting cultivation” and “slash and burn”.¹²⁹ This education of society starts from addressing general beliefs, such as the belief that villagers can participate in forest conservation, and then comes back to the more concrete concepts of the legal culture, such as who should have authority over natural resource management.¹³⁰

In the adjudication system, barristers try to convince judges to be more open to alternative views.¹³¹ Normally, in criminal cases, judges only check a composite of crime. The main factor in determining whether a crime was committed is establishing the intention of the defendants. So, in the case of forest trespassing, the judge will make a decision about whether the defendants knew that the area was a forest area. If the defendants knew, that means they had the intention to trespass.

There are three ways that lawyers try to influence judicial decision makers to admit more evidence that will lead to more acceptance of CFM.¹³² First, lawyers try to argue in court that defendants understand that they have the right to live on their land and continue to use the forest according to their CFM. Second, lawyers try to bring social science experts to explain the meaning of community rights and CFM. Finally, lawyers refer to the relevant district officer, called Nai Amphor, to reconfirm that the villagers were settled in that area long before the creation of PAs.¹³³ These three points are usually ignored by judges. For instance, although these three issues were raised by counsel during Pati Ming’s trial, they were not mentioned in the court decision at all.¹³⁴

Surprisingly, in a 2010 case about forest trespassing in Mae Hong Sorn Province,¹³⁵ the judge listened to these three arguments and ruled that the villagers were not guilty of forest

¹²⁸ Pinkaew Laungaramsri, *Redefining Nature: Karen Ecological Knowledge and the Challenge to the Modern Conservation Paradigm* (Chennai: Earthworm, 2001).

¹²⁹ See, for example, the work on rotation cultivation, e.g. Achara Rakyutidhram, ed., *Natural Resource Management* (in Thai) (Chiang Mai: Pongsawat, 2006).

¹³⁰ Interview with Direk, *supra* note 116.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Provincial Court, Chiang Mai (2001), 3860/2544.

¹³⁵ Provincial Court, Mae Sort (2010), 1737/2551.

trespassing. Nevertheless, this case could easily be overruled by the higher court, and the RFD officers will surely appeal.¹³⁶ However, this is still a very good sign of increasing acceptance of CFM by the courts.

5.2.1.4 Changing Legal Culture from the Grassroots

From the point of view of lawyers who work for human rights, implementing a constitutional right to practise CFM has to begin from both sides, with the beginning being the villagers and the end being the judges.¹³⁷ The Lawyers' Council of Thailand provides a training program on civil rights for citizens, especially grassroots people,¹³⁸ so that they can understand the basic law and apply the law accordingly.¹³⁹

A group of lawyers who are concerned about social justice also provides legal aid. Mainly, these lawyers focus on model cases that can eventually lead to breakthroughs in the human rights struggle, such as cases about labour law, consumer protection, and the environment.¹⁴⁰

At the same time that these lawyers help grassroots people, they also handle cases in the court. These lawyers hope that they will eventually be able to develop new cases which show concern about the constitutional rights of people to practise CFM.¹⁴¹

5.2.2 Public Prosecutors

Most of the penalties in forest law are criminal penalties such as fines and imprisonment. Thus, forestry law cases with the government (RFD or DNWP) as plaintiffs will have public prosecutors as Crown lawyers.

5.2.2.1 Procedure in Forestry Law Cases

Forestry law cases begin with RFD or DNWP officers arresting a suspect who violates the forest law.¹⁴² After the RFD or DNWP officers prepare evidence in the case and process the

¹³⁶ Interview with Direk, *supra* note 116.

¹³⁷ *Ibid.*

¹³⁸ See, online: Lawyers' Council of Thailand (22 June 2011) <http://www.lawyerscouncil.or.th/2011/index.php?name=gallery&op=gallery_detail&id=18#>.

¹³⁹ Interview with Direk, *supra* note 116.

¹⁴⁰ "Environmental and Litigation Advocacy for the "Have-nots", online: Environmental Law Thailand <<http://www.enlawthai.org/>>.

¹⁴¹ Interview with Direk, *supra* note 116.

¹⁴² Interview with Chaowat, public prosecutor in Chiang Mai Provincial Court (15 October 2010).

case further to the public prosecutors, the prosecutors will normally file the case in the Court of Justice.¹⁴³ Only two elements of the crime of forest trespassing need to be proven: intention, and the fact that the land is a forest area. Hence, there is no need to mention the *Constitution* because the crime is complete.¹⁴⁴

These cases are simply classified as criminal cases because the forestry law sets penalties of fines and imprisonment.¹⁴⁵ As a result, the procedure will focus only on the charge and the law concerning the case, which is the forestry law. When a case is considered to be a criminal case, the procedure must be strictly in accordance with the written law and the written law cannot be overruled.¹⁴⁶

Moreover, each type of law applies a different legal method. There are four types of cases: civil cases, criminal cases, constitutional cases and administrative cases. Violations of forestry law result in criminal cases. Such cases cannot be classified as constitutional cases based on public law implementation.¹⁴⁷ Unless the Constitutional Court declares the forestry law to be unconstitutional or a statute is enacted to overrule the forestry law, the forestry law still is in effect.¹⁴⁸

5.2.2.2 Enforcement of Forestry Law

Since CFM law has not been incorporated into Thai statutes, cases concerning the forest are mainly governed by state forestry law.¹⁴⁹ Normally, when RFD or DNWP officers arrest violators and process cases, public prosecutors will charge the violators in the Court of Justice. The violators often plead guilty and the court makes a decision. The court has a list which sets

¹⁴³ *Ibid.* According to the *Criminal Procedure Code*, a public prosecutor has discretion whether to file a case.

¹⁴⁴ Interview with Chaowat, *supra* note 142; Interview with Somporn, public prosecutor in Chiang Mai Provincial Court (19 October 2010).

¹⁴⁵ Interview with Somporn, *ibid.*

¹⁴⁶ Interview with Chaowat, *supra* note 142.

¹⁴⁷ Interview with Somporn, *supra* note 144.

¹⁴⁸ Interview with Chaowat, *supra* note 142..

¹⁴⁹ "Forestry law" includes the *Forest Act*, *National Forest Reserve Act*, *National Park Act*, and *Conservation and Protection of Wildlife Act*.

out which conviction will result in which penalty.¹⁵⁰ A typical sentence for a villager convicted of forest trespassing is probation for two years.¹⁵¹

Increasingly, forestry law cases have been about clearing forest land. Current issues include: the hiring of villagers to cut trees and clear forest land for farming or construction of resorts;¹⁵² the use of middlemen so that the real people behind these actions rarely get arrested; among the hill tribes, the Hmong often hire the Karen as employees on their farm lands located in forest areas.¹⁵³ People take advantage of forest land because it is in the public domain and there are not enough government officers to protect it.¹⁵⁴

In normal criminal cases, the court makes a decision and the defendants go back to their villages on probation. This situation does not result in any improvement in the deforestation crisis. However, the RFD and public prosecutors recently came up with the idea of civil compensation,¹⁵⁵ which has become an effective method of preventing forest trespassing.¹⁵⁶ The villagers are afraid of having to pay civil damages because the amount of compensation is very high.¹⁵⁷ In Somporn's opinion, normally, the amount civil compensation is fair for the villagers who clear land for cultivation of a size less than 10 rai (0.016 km²), and the decision about compensation is not posted in the villages' settlement areas.¹⁵⁸

¹⁵⁰ This list is known as "Yee Tok" which is known among judges and cannot be published. However, experienced lawyers can usually guess the terms of their clients' sentences. However, this list of penalties is not based on precedent and is not mandatory. It is meant merely as a guideline for judges.

¹⁵¹ *Supra* note 141, and 144. Normally, cases are heard in a District Court that has criminal jurisdiction and the penalty for violation is imprisonment for not more than three years or a fine not exceeding 60,000 baht. See *Statute of the Court of Justice 2000*, Royal Thai Government Gazette 117: 44 (18 May 2000), s. 25.

¹⁵² *Supra* note 144. In the "Kilo 5" case a forest trespass occurred in the area south of Chiang Mai. A businessman hired approximately 50 villagers from the northeastern region and transported them to the site to clearcut the land and plant large trees, thus pretending a community was established there. This case is under investigation.

¹⁵³ *Ibid.*

¹⁵⁴ *Supra* note 141.

¹⁵⁵ Department of National Parks, Wildlife and Plant Conservation, "Civil Compensation Calculation Method of Damages Due to Forest Trespassing" (in Thai), Circular No 0903.4/14374 (6 September 2005).

¹⁵⁶ *Supra* note 144.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

5.2.2.3 Belief in Genuine CFM

Government officers know the difference between real and false CFM.¹⁵⁹ In addition, public prosecutors do not want to charge people if they are just practising their normal village life ways.¹⁶⁰ In cases concerning the forest, because of the small number of RFD and DNWP officers, villagers' participation in forest conservation is needed. Recent CFM cases are thus often concerned with the expansion of villages after GPS mapping.¹⁶¹

Eventually, public prosecutors learn and establish how to enforce CFM cases. For example, they are aware of the scope of the villages that can be defined as practising CFM and have genuine forest reserves, not just small plots of land like backyards or fruit tree areas.¹⁶² Also, CFM villages are not only located in forest areas, but they have their own regulations that villagers use to manage the forest. However, there is still a lack of clarity about the issue of rotation cultivation. Normally, public prosecutors will not charge villagers if they farm in their traditional rotational areas.¹⁶³ Although public prosecutors and RFD and DNWP officers generally encourage the villagers to stop practising rotation cultivation, if villagers show that they are legitimately using their areas for rotation cultivation, the public prosecutors will understand.¹⁶⁴

5.2.2.3 Updated Knowledge for Law Enforcers

Education is important for lawyers even after graduation from law school. Society has changed rapidly and basic legal education is not enough.¹⁶⁵ University legal education provides only general concepts. In professional institutes such as the Lawyers' Council and Barrister's Council, lawyers get more training in practical law enforcement.¹⁶⁶ Methods of dealing with new issues such as internet business transactions and social movements like CFM were not

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

usually taught in law school. Lawyers need research tools so that they can update their knowledge and understanding about changes in society.¹⁶⁷

CFM is new for lawyers and clear legal concepts still need to be established on this issue. The simplest way for lawyers to apply the law concerning CFM is to use analogies from environmental law, forest law and criminal law, which contain closely-related content with which they are familiar; the *Constitution* seems less familiar and appears to be separate from forest issues, and is thus not often used.¹⁶⁸ Further, constitutional law was only added to the curriculum of the Barristers' Council a decade ago and the contents still mainly cover only governmental structure and political issues. Also, civil rights under the *Constitution* depend on statutory law implementation. Direct enforcement of the *Constitution* has not yet been established in a practical sense.¹⁶⁹ Lawyers do not know how to apply it, since they have no legal precedents to follow.

5.2.3 Judges

Cases concerning the forest can be divided into two main groups. One deals with forest trespassing and the other with clearing forest land. Another category of cases concerns illegal lumbering. Mainly, forestry law cases first come to the District Court.¹⁷⁰ Cases on wildlife or exotic plants are rarely found nowadays, because these species are very rare. However, these cases may be found in the illegal wildlife markets of Thong Khean and Jatujak.¹⁷¹ The concept of CFM as a constitutional issue is still far from the minds of legal decision-makers. Many judges do not find the *Constitution* relevant to CFM.¹⁷²

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ Interview with Sakda, judge in Chiang Mai Provincial Court (15 October 2010).

¹⁷¹ William M. Reyland, "Wildlife Smuggling in Thailand: A Matter of Convenience" (1 September 2011) Thailand Law Forum, online: Thailand Law forum < <http://www.thailawforum.com/illegal-animal-trade-thailand.html> >.

¹⁷² Interview with Sakda, *supra* note 170.

5.2.3.1 Decision According to the Charge

When a case is filed in court, the plaintiff has to claim that the defendant violated certain laws, generally statutory laws.¹⁷³ Then the judge has to decide whether the defendant is guilty. Moreover, the judge cannot base his or her decision on anything outside the evidence shown in the case.¹⁷⁴ Even if the defendant mentions the *Constitution* in the trial, if the judge does not see this as relevant he/she can ignore it.¹⁷⁵ In cases of forest trespassing, guilt depends only on whether it is obvious that the defendants violated the forest law. They cannot claim the defence of practising CFM because there is no statutory law that enshrines the right to use CFM or provides details about how to enforce such a right.

The Cabinet Resolution says that defendants can continue to live in their usual forest areas while litigating on the issue of whether they lived in the relevant areas before they were declared forest areas by administrative order.¹⁷⁶ However, the Cabinet Resolution only has the status of an internal order within government departments such as the RFD and the DNWP and cannot be enforced amongst the general public. Furthermore, the Cabinet Resolution cannot overrule state forest law, which is a statute and thus has greater legal weight.¹⁷⁷ As adjudication, it is fine to apply the Cabinet Resolution as long as this does not bring an argument against the law in court. The status of the Cabinet Resolution is that of government policy rather than law.¹⁷⁸

Overall, state forestry law still has full enforcement function until a community forest act is enacted or the Parliament changes the contents of the forestry law in accordance with the community rights supposedly protected under the *Constitution*.¹⁷⁹

5.2.3.2 “Illegal” CFM Regulations

The villagers who practice CFM enact their own CFM regulations. These regulations contain sanctions such as fines and seizure, although, according to state law, the villagers do

¹⁷³ Interview with Pattra, judge in Chiang Mai Provincial Court (9 November 2010).

¹⁷⁴ Interview with Sakda, *supra* note 170.

¹⁷⁵ *Ibid.*

¹⁷⁶ Interview with Wanchai, judge in the Supreme Court, Bangkok (16 November 2010).

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ Interview with Sakda, *supra* note 170.

not have authority to enact such regulations since CFM committees are not considered local administrations.¹⁸⁰ Criminal penalties such as fines or seizure require some kind of authority such as local administrative law.¹⁸¹ Hence, CFM regulations simply have “outlaw” status and cannot be enforced. While villagers might use their own CFM regulations among themselves based on a commitment or a contract, courts will consider any of the forms of CFM practice which do not follow the statutory law to be illegal.¹⁸²

5.2.3.3 Unclear Principles of Law

There is no clear legal concept of CFM, at least not enough for it to be enforced as law.¹⁸³ CFM is not considered to be in the public domain because CFM allows only the members of some communities to use the forest. Also, CFM does not reflect the concept of ownership. The objective of CFM is to use the forest as the villagers always have and to participate in forest conservation. However, it still is not clear whether the concept of public domain under section 1304 of the *Civil and Commercial Code* can be applied.¹⁸⁴

Both local and hill tribe villagers claim the right to use the forest and to practise CFM. This argument is based on longstanding local participation and, in the case of hill tribes, indigenous rights. However, the current practice of CFM does not have continuity with traditional concepts;¹⁸⁵ rather, villagers adapted traditional ecological practices and philosophies, such as the spirituality of the forest, with ideas from NGOs and merged them with concepts of subsistence livelihood. Thus, CFM practice lacks continuity as customary law.¹⁸⁶

The restorative justice function of CFM is another claim that can be used to argue for the operation of CFM as law.¹⁸⁷ That is, in dealing with natural resource conflicts, CFM regulations can be treated arrangements by the villagers who share lands within forest areas. However, this concept is not inconsistent with state forestry law. Therefore, if the villagers use this

¹⁸⁰ Interview with Wanchai, *supra* note 176.

¹⁸¹ *Tambon Assembly and Tambon Administrative Organization Act 1994*, Royal Thai Government Gazette 53 a:11 (2 December 1994) [TAO Act]. This act provides the power to the local administration to create local regulations.

¹⁸² Interview with Sutee, judge in the Supreme Court, Bangkok (16 November 2010)

¹⁸³ *Ibid.*

¹⁸⁴ Interview with Wanchai, *supra* note 176.

¹⁸⁵ Interview with Sutee, *supra* note 182.

¹⁸⁶ Interview with Pattra, *supra* note 173.

¹⁸⁷ Interview with Wanchai, *supra* note 176.

concept, they have to adjust their CFM regulations to be consistent with Thai forestry laws such as the prohibition against using timber from the forest.

Thus, in all aspects, CFM is still not ready to be enforced directly as law.¹⁸⁸ Enforcement of CFM still needs support from statute law to define and develop the practice.

5.2.3.4 Obligation to the Environment

Because of the current deforestation crisis, adjudicators need to apply environmental concepts seriously.¹⁸⁹ Anything that can lead to forest conservation should be the main objective of the court. Hence, if CFM is part of the solution, judges should consider applying CFM. This concept is law implementation as administrative strategy.¹⁹⁰ To fulfill the objectives of environmental law, the forest must be preserved. However, legal implementation should not lead to a double standard.¹⁹¹ For example, although RFD officers received complements when they arrested the rich who trespassed in the national park, this law should be applied to everyone, whether rich or poor.

Civil compensation is a legal tool that is workable even though it is not perfect.¹⁹² There is still dispute about the legitimacy of using the new compensation calculation method to punish poor villagers; also, the method of calculating it is still controversial. For example electricity rates for running air conditioning units are used to calculate warming air caused by forest trespassing and clearing the land for farming. As long as civil compensation can reduce deforestation, it is worth trying.¹⁹³

5.2.3.5 Examples of Distrust

In forestry law cases, there are many examples of people who are convicted of crimes. As a result, judges have become very sceptical about whether genuine CFM exists.¹⁹⁴ For example, there is the case of the villagers who, before RFD officers came on patrol, cleared a forest area and then planted large trees, which they pretended were as old as the community. Similarly,

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Interview with Sakda, *supra* note 170; interview with Wanchai, *supra* note 176.

¹⁹² Interview with Wanchai, *ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

judges may be sceptical about the reliability of hill tribe witnesses because of the case of an indigenous community that helped to hide some of its youth suspected of sexually assaulting a teacher in their village.¹⁹⁵ This tendency not to cooperate with the police by hiding suspects may be common in some hill tribe communities.¹⁹⁶ In addition, the fact that many places show loss of forest land to agriculture means that judges are more interested in saving the forest than “saving” people who can adapt themselves. From these examples, judges often are pessimistic about whether true CFM exists.

5.2.3.6 Cases Differentiated by Different Laws

The separation of the courts and the legal methods applied in different cases is another reason that judges do not apply the *Constitution* in forestry law cases.¹⁹⁷ Law implementation divides criminal cases from constitutional law. This concept began to be taught in law school a decade ago. Further, the division of the court into different branches causes judges to strictly apply the law within the jurisdiction of the courts.¹⁹⁸ Judges look at forestry law cases only through the lens of criminal law. Hence, the legal method that judges use in forestry cases is the one used in criminal cases.¹⁹⁹

5.2.4 Lessons Learned from the Lawyers

Most lawyers still live in the space of state law. They apply the fundamental criminal law and statutory law principles of the Thai legal system. These are easy and safe tools for lawyers to use: forestry law and criminal procedure create a comfort zone of law enforcement. CFM and community rights under the *Constitution* are new concepts for lawyers and are thus unclear. Therefore, CFM is rarely applied or argued in court cases. As a result, lawyers have no precedents on which to build their future practice.

¹⁹⁵ This case happened approximately 10 years ago in a northern hill tribe village when a woman from the city applied to teach in a remote area and became popular among her students. It was reported on the news that she was sexually assaulted by many of her male students. When the police investigated the villagers in that community, many of the villagers tried to cover the fact and blamed the teacher. This became national news in Thailand for a few weeks.

¹⁹⁶ Interview with Wanchai, *supra* note 176.

¹⁹⁷ Interview with Sakda, *supra* note 170.

¹⁹⁸ These include the Civil Court, Criminal Court, Administrative Court, and Constitutional Court.

¹⁹⁹ Interview with Sakda, *supra* note 170.

CFM becomes alienating – it does not seem to belong to the legal sphere. Lawyers view CFM as a social or political movement that has nothing to do with the law. Hence, villagers can practise CFM as long as they do not intrude into the legal sphere. Once CFM steps inside the legal sphere, resulting in arrests or lawsuits, CFM has to follow the Thai legal tradition. Lawyers will apply the law they are familiar with, for example, forestry law and criminal procedure, which are on the solid ground of fundamental state law. CFM practice as living law outside the court is not “law” from the lawyer’s perspective, but it is politics, which are fluid and unreliable.

The *Constitution* has not been applied much in this context yet. It is relatively new compared to the criminal law, which has been developing from its inception in Roman law to its codification in the laws of Thailand. Although the *Constitution* is considered to be the supreme law of the land, law enforcement in this area is new and, unlike criminal procedure, Thai constitutional procedure lacks detail and development. However, a long statute is not needed to explain how to apply the *Constitution* and it would not work in any event. It will take time to implement a new legal tradition in the system, although issues relating to CFM may help with this long process.

5.3 Chapter Conclusion

This chapter reflects field research interviews with selected participants from internal legal structures that enforce the law concerning CFM: government officers who have direct authority regarding forest conservation; and the lawyers and judges who enforce the law concerning CFM. The objective of the interviews was to discover the legal consciousness of the interviewees regarding legal implementation of CFM – how individuals understand the law and apply it in their line of duty.

The group of government officers interviewed for this study, RFD and DNWP officers, have direct responsibility for forest conservation. Government officers give priority to forestry law, even before the *Constitution*, because it is the forestry law that will guide them in fulfilling their responsibilities as forest conservation officers. However, government officers realize that the people’s participation is also important to achieving their forest conservation goals and to survival in village communities – so that they are not removed or confronted by large numbers of protesters. Hence, government officers accept CFM as long as there is no further forest trespassing.

The last group of interviewees was legal professionals. Lawyers apply statutes and codes in which fundamental legal principles are embedded. State law is the main source of law. CFM practice is new and alienating for lawyers and is treated as mere administrative policy by government officers. Also, the *Constitution*, in terms of civil rights, is still young law and contains little explanation about direct enforcement of community rights. Since CFM does not have a statute that guides the enforcement of the law in detail, lawyers simply ignore it. Living law in society is not “law” in the view of most lawyers. Therefore, CFM creates a loophole in law enforcement; the law outside and inside the courts is the law of two different worlds.

In this chapter, I have illustrated the legal consciousness of government officers and legal professionals about their implementation of law concerning CFM. So far, I have discussed legal consciousness in Thai society concerning CFM in both the external legal culture – among local people in selected communities who practise CFM (see Chapter 4) – and in the internal legal culture, among individuals who enforce the law concerning CFM, such as government officers and legal professionals. In the next chapter, I will examine Thai legal culture holistically, taking a macro view. Because legal culture does not always directly follow what the law says, but rather what people do, I call my investigation in the next chapter “decoding” Thai legal culture.

CHAPTER 6 DECODING THAI LEGAL CULTURE

This study hypothesizes that the Thai legal system is incompatible with CFM, and the approach used to investigate this hypothesis is to look at the legal culture and consciousness of the people who are involved in implementing the law. Chapter 4 and 5 detailed what villagers, government agents and members of the legal profession think about CFM and the way they use the law. This chapter will explain the Thai legal culture in the surrounding contexts of the law governing CFM.

“Legal culture” is behaviour of people in society that reflects the use and enforcement of law.¹ Sometimes people follow the written law, but this is not always the case; thus, we have to look at the contexts that cause legal behaviour. In Thailand, CFM is theoretically enshrined in the *Constitution* but, in practice, the *Constitution* is not used to protect CFM legal rights. The question then is, “What has gone wrong in the Thai legal system?” One assumption is that the obstacles and incompatibilities are based in the legal culture.

Thai legal culture is hidden in legal practices that contradict the written law and its proclaimed legal principles. For example, as I discussed in Chapter 3, section 3.3, it is written that the *Constitution* is the supreme law of the land, and any law that conflicts with the *Constitution* will not be enforced. However, the forestry law actually contains some provisions that conflict with people’s participation in natural resource management, which is guaranteed by the *Constitution*. In fact, state forestry law is the main law that lawyers apply rather than the *Constitution*. Hence, to find Thai legal culture we have to “decode” it. We have to interpret Thai legal culture not only based on the written law, but on its implementation, the results of putting the law into practice.

This chapter will analyze the implementation of the law that governs CFM in the Thai legal system, which exhibits strong normative concepts of positivism.² The implementation of

¹ David Nelken, ed., *Comparing Legal Cultures* (Aldershot, UK: Dartmouth, 1997).

² I use the phrase “normative concepts of positivism” in which I put two concepts together. “Normative” describes the characteristic of legal systems that uses and explains legal principles and formulates legislation based on legal ideologies and interprets and enforces the law according to legal principles. In this way, using legal principles is main approach of legal implementation, e.g. the French and German legal methods. The opposite approach to legal implementation is the descriptive concept, which originates from problems in society and uses the law to resolve those problems so that the legal principles used are flexible and adaptable to social change, e.g. the Anglo-Saxon legal system. See Amorn Chantarasomboon, *Administrative Law* (in Thai) (Bangkok: Public Law Department, Faculty of Law, Ramkhamheang University, 1993).

this law has a direct effect on traditional forest management rights like CFM. In a way, Chapter 6 continues the picture developed in Chapters 4 and 5, but on a different scale. Chapters 4 and 5 focused on individuals' thoughts about how people enforce the law concerning CFM, whereas this chapter aims to find a general trend of behaviour in the Thai legal system, or legal culture, that shapes CFM implementation.

This chapter is divided into three parts. The first part in 6.1 interprets the results of the field research interviews described in Chapters 4 and 5 that tried to capture the legal consciousness of the people involved in CFM. The second part in 6.2 is a portrait of the formation of Thai legal culture. The third part in 6.3 analyzes how Thai legal culture affects CFM enforcement. These three parts respond to each other: I input the questions in section 6.1, and describe components of the Thai legal system in section 6.2, then review the results of the CFM implementation situations in section 6.3.

6.1 Questions about CFM Implementation

This section raises some questions about whether finding out about the law concerning CFM and its implementation could lead to a connection between legal consciousness and legal culture. The previous chapter focused on the legal consciousness of three groups of people involved in CFM. The villagers who practise their CFM because of their experiences of deforestation need to show that they can live in and protect the forest in order to claim their rights to participate in natural resource management under the *Constitution*. In practice, the villagers use their own regulations to enforce CFM, while they cooperate with the government officers who "understand" the villagers' traditions regarding conservation and use of the forest.

Government officers such as RFD and DNWP officers believe they have the primary responsibility to preserve the forest and thus they need cooperation from the villagers. This group applies both the villagers' regulations and the state forestry law. However, government officers realize that they cannot fully anticipate villagers' actions. For example, they did not

Another concept that I use to form this word is "positivism", which is a legal philosophy of law that opposes the idea of natural law. Legal positivism is school of thought that explains that the law is consists of orders of the sovereign and is based on written law of the state.

Thus, I use "normative concepts of positivism" to describe Thai legal culture that is based on written law and that is implemented based on legal principles that are sometimes too rigid and rarely apply to dynamic social situations.

take part in the survey and approval of the GPS map, although the villagers invited them to do so, because they were reluctant to accept CFM in PAs.

The lawyers and judges who apply state law think that the villagers' regulations concerning CFM are illegal. However, they think the practice of CFM and cooperation between villagers and government officers based on government policy is fine, as long as villagers do not end up in court.

The legal perspectives of these three groups reveal some issues that make Thai legal culture incompatible with CFM. The following question-raising section is divided into four parts. The first part in 6.1.1 focuses on the subject of CFM – community. The second part in 6.1.2 looks at the object – forest land and management. The next part in 6.1.3 discusses the regulations involved in CFM that are used by villagers, government officers and lawyers. And the last part in 6.1.4 is a critique of the procedures for handling CFM. The following four parts aim to reflect the questions and debates concerning CFM.

6.1.1 The Subject of CFM Law Enforcement: Community

The subject that manages a community forest is a community. Thai society has a picture of an ideal community that practises CFM. In this study, the three groups of people involved in CFM – villagers, government officers, and lawyers – reveal their views about community. This section raises questions about community that are controversial for law enforcement. What does community look like? Which are the “real” communities that currently practise CFM? What is the legal concept of community? Finally, how does the law apply its concepts to the community?

6.1.1.1 Who is the Community?

During the drafting of the *Community Forest Bill*, there was a furious debate³ about which communities would be considered able to practise CFM.⁴ After the petition from the people's movement to submit the *Community Forest Bill* to the Parliament in 2000, the RFD also submitted their draft bill to the Parliament. In addition to the issue of CFM inside PAs, the

³ Verena Brenner, *et al.*, *Thailand's Community Forest Bill: U-Turn or Roundabout in Forest Policy?* SEFUT Working Paper No.3, Socio-Economics of Forest Use in the Tropics and Subtropics (Freiburg: University of Freiburg, 1999), online: University of Freiburg <<http://www.freidok.uni-freiburg.de/freidok/>> at 23-26.

⁴ This took place before the *Bill* was terminated by the Constitutional Court in 2009. See more details in Chapter 3, section 3.3.3.

definition of the “community” that could practice CFM was hotly contested by both sides. Also, when the bill went to the Senate, this topic again became a hot issue between the committee on people’s participation, who were for it, and the committee on environment and conservation, who were against.⁵

Thai law only accepts two kinds of legal subjects: individual persons and juristic persons established by law. There are two types of juristic persons: private law persons and public law persons. The first type is governed by the *Civil and Commercial Code*,⁶ which allows a group of people to register as a partnership, company,⁷ or association.⁸

Another type of juristic person under Thai law is formed under the public law concept. Juristic persons such as public enterprises,⁹ government agencies,¹⁰ and local administrations¹¹ are established by statute. Under the centralization and *déconcentration* concept, a village in Thai law is not a juristic person. The units of the hierarchy of government administration¹² – from village to subdistrict, or Tambon, to district – are not considered juristic persons. The provincial administration¹³ is the smallest unit to be considered a juristic person according to the concept of governmental agency. However, under the decentralization concept, the smallest unit of local administration in public law that is considered to be a juristic person is the Tambon Administration Organization (TAO).¹⁴ These public law juristic persons are governed by state law, while communities that form in a village are subsumed in the local administrative structure.

⁵ Kesorn Sithiniu, “Final Turn of the Community Forest Bill: Accept the Community Forest in the Conservation Area or Not?” (in Thai) (2002) 17:208 *Sarakadee Magazine*, online: *Sarakadee Magazine* <<http://www.sarakadee.com/feature/2002/06/vote.shtml>>.

⁶ *Civil and Commercial Code*, Royal Thai Government Gazette 196:42, Book 1, Title 2, c.2.

⁷ *Ibid.*, Book 3, Title 22.

⁸ *Ibid.*, Book 3, Title 23.

⁹ For example, the Electricity Generating Authority of Thailand; see the *Electricity Generating Authority of Thailand Act 1968*, Royal Thai Government Gazette 102:1 (2 November 1968), s. 6.

¹⁰ See the *Public Administration Act 1991*, Royal Thai Government Gazette 156:1 (4 September 1991), s.7.

¹¹ See the *Provincial Administration Organization Act 1997*, Royal Thai Government Gazette 114:62 (31 October 1997), s. 8; *Municipality Act 1953*, Royal Thai Government Gazette 70:14 (17 February 1953) 222, s. 7, para. 2; and the *Tambon Assembly and Tambon Administrative Organization Act 1994*, Royal Thai Government Gazette 53 a:11 (2 December 1994), ss. 6, 43 [TAO Act].

¹² In Thailand, regional administration, or *déconcentration*, is based on the units of village, subdistrict, district, and province. Only provinces have the status of juristic persons.

¹³ *Public Administration Act 1991*, *supra* note 10, s.52.

¹⁴ *TAO Act 1994*, *supra* note 11, s.43.

However, neither of these two types of juristic persons, private or public, applies to CFM communities. The villagers form their CFM in their communities naturally, depending on their community's characteristics. The villagers never legally register their CFM. They just establish CFM through the consensus of the whole community where they live. This can be identified as living law based on the concept of legal pluralism, but neither of these legal concepts applies in the Thai legal system.¹⁵

Overall, when we try to define which communities would be entitled to conduct CFM, there are three points to consider. First, a community that practises CFM is not a juristic person under Thai law. A "community" is normally a group of villagers who organize and create their rules on forest conservation together. An exception is if they have established their CFM within TAO, the local administration; if so, they can use the TAO law.

Second, the origins of a community can be various. In the past, the *Constitution of 1997*, section 46, allowed "Persons so assembling as to be a **traditional community** shall have the right..."¹⁶ Later, in the *Constitution of 2007*, section 66 lists three groups that can be communities who practise CFM:

Persons so assembling to be a **community, local community, or traditional community** shall have the rights to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and **practice in the management, maintenance, preservation and exploitation of natural resources, environment, and biological diversity in a balanced fashion and persistently.**¹⁷

As a highlight at the end of section 66, above, the main focus is on how subjects conduct CFM: whoever they are, they must practise "in a balanced fashion and persistently". Hence, the change from 1997 to 2007 created a wider definition of "community"; it does not need to be a traditional community as in the past. In general, it would benefit forest conservation to have more people take part in CFM. My concern is actually that the current definition of "community" is too broad; it could potentially include any group, and this might lead to over-exploitation of the forest if a proper monitoring system is not in place. So far, the only

¹⁵ See more discussion in section 2.3.4, above.

¹⁶ *Constitution of the Kingdom of Thailand 1997*, trans. by Office of the Council of State, Royal Thai Government Gazette 55 (11 October 1997), c. 3, s. 46 [*Constitution of 1997*] [emphasis added].

¹⁷ *Constitution of the Kingdom of Thailand 2007*, trans. by International Foundation for Electoral System-Thailand and the Political Section and Public Diplomacy Office of the US Embassy-Bangkok, Royal Thai Government Gazette 124:47 (24 August 2007), c. 3, s. 66 [*Constitution of 2007*] [emphasis added].

monitoring that exists is that the RFD and the DNWP have to know the community very well and cooperate with its members.

Third, the location of the community and its CFM can be inside or outside forest areas. A community can be located outside their CFM area,¹⁸ while some communities can live within it. Some communities' boundaries are based on the total subdistrict boundary and some communities just have their CFM within their villages. In addition, there are some CFM areas that are located outside forest areas, but their community forests are located in forest conservation areas. So, there are various kinds of communities that practise CFM.¹⁹ The issue of CFM in PAs has become controversial.²⁰ However, as mentioned earlier, under the *National Forest Reserve Act*, the Director General can grant permission to a person to utilize national forest reserve lands for up to 30 years,²¹ and also the Community Forest Management Bureau has received permission to register CFM within the forest areas outside PAs like national parks and wildlife sanctuaries.²² However, CFM in national forest reserves is not a main target of the grassroots CFM movement, which aims to preserve the community rights of people who have CFM in PAs such as national parks and wildlife sanctuaries.

¹⁸ For example, Tambon Maetha has their CFM area next to their village. They have their residential area outside the forest areas, but their cultivation areas overlap with national forest reserve lands. The mountainous area surrounding their village is their conservation forest, yet, when the creation of the Maetakrai National Park was announced, the DNP tried to prevent continuing use of villagers' residential and cultivation areas.

¹⁹ See Pearmsak Makarabhirom, "Politics of Community Forest Management in a Harmonized Way" (in Thai), Paper presented at the 2005 Thailand Development Research Institute Conference, Ambassador City, Chomthain, Chonburi (26-27 November 2005).

²⁰ Panat Tasneeyanond, "Community Forest Bill Debate: Opposition Argument" (in Thai) (2002) 17:208 *Sarakadee Magazine*, online: Sarakadee <<http://www.sarakadee.com/feature/2002/06/vote.shtm>>.

²¹ See more details in Chapter 3, section 3.3.2, above.

²² *National Forest Reserve Act, 1964*, Royal Thai Government Gazette 81:38 (28 April 1964) 263 [*National Forest Reserve Act*]:

"Section 16. The Director-General is empowered, with approval of the Minister, to grant permission to any person in the national forest reserves in these following cases:

(1) utilization or habitation in the national forest reserves for a period of a term not less than five years but not exceeding thirty years [...]

Section 19 For purposes of control, supervision, maintenance or improvement of the national forest reserves, the Director-General is empowered to order, in writing, the competent officer or officer of the RFD to carry out any activity therein."

6.1.1.2 Authority and Responsibility of the Community and the CFM Committee

In the process of initiating CFM, the villagers from the whole community reach a consensus to commit themselves to forest management. After the public hearing and decision making process, the next step is for the community to form a CFM committee. Some communities hold elections for CFM committee members, but some may appoint members or may give authority to the headman or his assistant to create a CFM committee.

The villagers do not think about the source of authority of their committee. They just simply structure their committee based on their traditional pattern of local management. This practice comes from the *déconcentration* system, in which the strongest unit in society is the village.²³ The theoretical explanation of this from lawyers and social scientists is that self-determination and direct democracy applies and gives authority to the villagers to conduct a public hearing in the community and to make a decision by consensus among the villagers. Therefore, community regulations are derived from the social contract.

However, Thai law requires more than social contract theory to apply law to everyday life. The public law concept in Thailand establishes that public agencies have direct authority from statutory law to serve the public interest and, therefore, they can use police power.²⁴ Public agencies only have power within the law, although police power granted by law can be used to control the people. Hence, public agencies have hierarchies and can exercise their power within the limits of law. In contrast, people, as private agents, are equal before the law and they have free will to do whatever they want, as long as their actions are not against the law or do not violate other people's rights and the national interest.

This issue of public and private agents raises a question about whether the community is a public or a private agent. On the one hand, a community is made up of villagers as a collective entity who have agreed to follow the CFM regulations they created together. Further, they rely only on the *Constitution* as their source of power, or right, to participate in forest conservation.²⁵ However, the villagers, as a collective, also require their regulations to be observed by other people, even newcomers, who have never agreed to abide by their CFM regulations. The CFM committee assumes they have this authority.

²³ See Chatthip Nartsupa, *From History of Villages to Theory of Two Systems* (in Thai) (Surin: Surindra Rajabhat University, 2001).

²⁴ See Worapoj Wisarutpit, *Concepts and Basic Principles of Public Law* (in Thai) (Bangkok: Nititham, 1997).

²⁵ *Constitution of 2007*, *supra* note 17, s.66.

As the villagers act collectively when they conduct their CFM, they think “outside the box”; they do not apply any particular statute. They only apply their constitutional rights directly under section 66 of the *Constitution of 2007*.²⁶ I would conclude that a CFM committee is a private agent acting as a collective entity, as it is not subject to any external law as a source of power. As the villagers have their own free will, they can do whatever they want as long as their actions do not violate anyone else’s rights.

In the opinion of government officers, when a CFM committee has some kind of power in the community, then that committee should be held accountable.²⁷ So far, most CFM committees seem to perform their duties as if they were just another village committee, such as the committee on community health care.

Since there is no statutory law supporting community rights under the *Constitution*, no written law specifically mentions their authority, so the general law will apply to the committee as ordinary people who are subject to the law. This means that, if the committee causes any harmful act, tort law will be applied. There will be no immunity for the committee members who carry out their duties as part of the local administration. Such duties would include approving a request to cut down trees or seizing a power saw according to the CFM regulations.

It is unclear whether a CFM committee can claim that it acts according to the *Constitution of 2007*, section 28, paragraph 3:²⁸

A person shall be able to directly exercise his or her right to bring a lawsuit to cause the State to comply with the provisions of this paragraph. However, where there already exists a law with details of the exercise of such rights and liberties enshrined in this Constitution, the exercise of the rights and liberties shall be in accordance with the provisions of the said law.

There has been no court challenge on this issue yet. Therefore, there are no examples of the enforcement of this law. This issue relates to the legal culture derived from legal texts, which will be discussed below in section 6.2.2.

²⁶ *Ibid.*, s.66.

²⁷ Interview with Manop, DNWP officer (25 November 2010).

²⁸ *Constitution of the Kingdom of Thailand 2007*, *supra* note 17.

6.1.1.3 How “Community” Has Been Changed through the Changing Law and Changing Society

Before the modernization of the Thai legal system, the concept of “community” existed in the eyes of law, but then it disappeared with modernization and the influences of individualism from the Western legal system. The ancient law supported the community and the people could act freely. Also, the government in ancient times had less control over natural resources, so that the villagers could freely access and use them.²⁹ In the past, the land was wild and unoccupied. Forests were viewed as waste lands and those who cleared the land and cultivated it could own it. Also, there were communal lands that everyone could use, and on special lands, such as spiritual places, cemeteries and irrigation areas, everyone had to participate in ceremonies and maintain these lands communally.

Traditional Thai society was based on feudalism and hierarchy. This concept is reflected in the law concerning land management. Moreover, before Thailand became a nation state, the laws in the north and the central region were different. In the north, the law was based on the *Mangraisart*, while, in the central part, the law was based on the *Law of the Three Seals*.³⁰ Then, during the colonial era, the Thai legal system adopted Western concepts. This process transformed Thai law to the modern law that is based on individualism.³¹ However, there are some allowances made for the older forms of law. For instance, the *Property Law* permits people to access common property if this has been the custom; for example, they can graze their cattle on their neighbour’s land, even if the majority of the land has been put to other use, such as for an irrigation system.³² There is also an issue about changing concepts of time and space embedded in Thai legal culture that will be analyzed in section 6.2.1.

Politics is one of the important forces that has changed communities. Since Thailand changed its regime in 1932, the people have been developing their beliefs and legal

²⁹ Pornpilai Lertwicha & Aroonrut Wichienkeeo, *Village Community in Khan Watershed* (in Thai) (Bangkok: Thailand Research Fund, 2003).

³⁰ See Chapter 3, section 3.1.1, above, for more details.

³¹ For example, modern property law establishes that a person can do anything to his or her property. This is a real or absolute right under Western law concepts. Another example is a concept in the law of contract that allows a person to agree with others to do anything that is not against the law, and to abide by that contract. This shows individuals have rights to do things without attachment to other people, while the rural community in Thailand is still bound to other people, such as family members and neighbours. Interestingly, collective action is often taken to maintain common property in rural areas.

³² Lertwicha & Wichienkeeo, *supra* note 29.

consciousness. Even though the concept of the modern constitutional monarchy was introduced by the People's Party, Khana Rasadorn,³³ it is undeniable that this concept has steered Thailand towards democracy. Then there were another two waves of political changes: nationalism and development during the Plaek Piboonsongkhram and Sarit Thanarat government eras; and the "semi-democracy" that led to the student uprising in the 1970s. Communities were affected by events in the capital as well. When the true rural grassroots movement erupted in the 1990s, it was the outcome of development and globalization that had been going on since the 1970s. During the political reform movement in 1993, community rights were written into the draft constitution when the National Assembly on Constitutional Drafting held public hearings. The grassroots became awake to this issue and had high expectations. The *Constitution* had become their direct source of law. The villagers still talk about their rights that are guaranteed in the *Constitution*.³⁴

Has the *Constitution* changed the concept of community with the rebirth of community rights in the written law? The villagers' ideas about the *Constitution* have changed since they joined the civil rights movement and established their community rights under the *Constitution*. However, for lawyers, the new *Constitution* overwhelmed them with many new ideas, such as the legal status of new independent organizations and new civil rights.³⁵ As a result, for most lawyers, the *Constitution* did not cause real reform but only created a new structure within the same legal ideology. Legal education embedded public law concepts in the normative traditions of conventional legal analysis that start with theory and then apply it to case studies. However, in the early constitutional reform period, there were not many constitutional cases, so law professors used analogies from French and German cases. This raises questions about how the Thai law applies the changing concepts of community and CFM and how this period of change affected the legal culture of the villagers, government officers, and lawyers.

³³ See Chris Baker & Pasuk Phongpaichit, *A History of Thailand* (New York: Cambridge University Press, 2005); Kobkua Suwannathat-Pain, *Kings, Country and Constitutions: Thailand's Political Development 1932-2000* (London: RoutledgeCurzon, 2003).

³⁴ Interview with Amnart, former headman of Tambon Maetha, Mae Orn District, Chiang Mai Province (28 October 2010); interview with Keaw, headman of Ban Huaieikhang, Mae Wang District, Chiang Mai Province (21 October 2010); interview with Witchan, male villager of Ban Khunte, Jomthong District, Chiang Mai Province (26 November 2010).

³⁵ Boonlert Khachayutthadej & Prayut Khongmuang, eds., *Substance of the People's Constitution* (in Thai) (Bangkok: Matichon, 1998).

Another aspect of community is the difference between the rural and city contexts. The communities in rural areas have stronger community unity than those in the city.³⁶ This also affects the efficiency of a community's CFM practice. In fact, communities in the city do not claim that they want to participate directly in forest conservation. Individual people, such as those who are educated in the city, may want to preserve the forest and may have a totally different view of CFM. The law does not care where the community is located, but considers the "readiness" of communities that practise CFM. This idea seems to reflect concepts of legal pluralism.³⁷ So far, lawyers just think about how communities are different, but do not apply any legal action to pursue this thought. Presumably, civil rights lawyers want to apply the concept of legal pluralism in Thailand, but they cannot find the law to enforce this concept because Thai law tries to create universal laws. Based on the idea that there should only be one standard, Thai legal ideology will usually not accept different implementations of law. However, in practice, they are double standards everywhere in Thai legal culture.

6.1.1.4 People's Ideas about the Definition of "Community" for CFM

Many people are sceptical about the authenticity of communities. They want to see traditional communities that genuinely practice forest conservation, as demonstrated during the *Community Forest Bill* debate in Parliament. From another perspective, the Community Forest Division in the RFD has registered groups of people from villages with the consent of their headmen; thus, the Division does not care whether those communities are "traditional". These two views about communities that can perform CFM reveal two different intellectual approaches. The first looks at the subject as a legitimate agent that can perform CFM. Most people believe that only people who lived in forest areas before their lands became subject to Thai forestry law can be legitimate practitioners of CFM. Also, they believe that such a community must continue its traditions of living, using and maintaining the forest in a sustainable way. This subjective approach³⁸ depends on a person's perspective. One can treat

³⁶ Anan Ganjanapan, *Community Dimension: Local Epistemology on Rights, Power, and Natural Resource Management* (in Thai) (Bangkok: Thailand Research Fund, 2001).

³⁷ Currently, there is no law on this matter, but it could be created by drafting criteria about what kinds of communities can practice CFM.

³⁸ I use the word "subjective" to express two meanings here. The first meaning is to look at the community as a subject or an actor. The second meaning refers to what people believe is subjective, because it depends on their attitudes toward communities as either having rights or being exploiters. When I use the word "objective", I also have two meanings in mind. One is to look at the forest as an object and the other is the objective perspective that just looks at facts and is likely materialistic.

the community that claims CFM as having rights. Others look at a community that claims CFM as getting a “free meal”. To illustrate, the forest seems to be a “gift” to certain groups that have free access to the forest land, while other people have to buy land as private property. Similarly, CFM may be viewed as a community privilege and as discriminating against people outside the forest.³⁹

The second way is to look at the object as being forest conservation, which needs people’s participation. In this approach, greater participation is a way to help the government preserve the forest. So, this objective approach appreciates anyone who can join in forest conservation. However, this openness can lead to forest plantations and resort businesses using vast tracts of land in forest areas to grow trees or harvest forest products. CFM is supposedly a form of forest conservation, and the acceptance of too many types of communities can lead to misuse of the forest.

According to my field research interviews, government officers and lawyers want to define the types of communities that should be allowed to practise CFM, because this relates to the issue of legitimacy of the community to participate. Otherwise, the community that practises CFM just receives free land to harvest, while people in the city have to buy land. On the other hand, if the definition of those who can participate in forest conservation were broadened without limit, this would mean more people would have the opportunity to participate and it would be good to have more people helping to preserve the forest. This open-ended approach would mean strictly monitoring the process of participation.

In section 6.2, I will show how the Thai legal system shapes its legal culture with regard to the issue of community and how it implements the law on community.

6.1. 2 The Object of CFM: The Land

The Thai legal system has had its own laws governing land management since before the birth of Siam. The ancient law applied different rules on land management until the law reform era during the reign of King Rama V. Also, the concept of the forest as a natural resource has been viewed differently in different legal contexts. Normally, Thai law classifies the forest as public property but, indeed, that concept has different shades of meaning: there can be various forms of public property, such as Crown land, state property, and common property. These meanings overlap each other and have unclear boundaries. These concepts also raise questions

³⁹ Tasneeyanond, *supra* note 20.

about how the three groups studied in this dissertation would conceptualize land and land rights, and how those concepts shape their legal cultures.

6.1.2.1 Crown Land

Many Thai lawyers believe in the fundamental principle of public land as Crown land under the *Land Code*, which is a pillar of land management in the Thai legal system. This solid concept holds that the lands belong to the king, who then places Crown land in the public domain.

The hill tribe villagers are not familiar with the Crown land concept and the code laws are not known to them. Thus, the hill tribes have their own views about land which are based on the concepts of possession and rotation cultivation that are part of their legal traditions. For instance, in the systems of many hill tribes, rights of possession extend to their seven cultivation areas. Moreover, as illustrated by the history of northern Thailand, expansion of the central government depended on the power of the king, which could be either weak or strong; authority expanded only when the power of the king was strong.⁴⁰

Who owns the forest? The concept of Crown land shapes land management in the Thai legal system. Based on this, government agencies perform their duty to preserve the land and natural resources for the state.⁴¹ However, this concept is different from the hill tribes' philosophy that the land has no boundaries and they are free to use any land that is unoccupied. This concept is also different from that of most CFM communities, for whom public domain refers to the next generation and the people's right to participate leads to another concept: that natural resources belong to the commons.⁴² Hence, the forest belongs to the people, and the people have the right to participate in forest conservation as a fundamental right – and this right is inherent, not given by the government.⁴³

⁴⁰ James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven, CT: Yale University Press, 2009).

⁴¹ Royal Forest Department, *100 Years of the Royal Forest Department* (in Thai) (Chiang Mai: Royal Forest Department, Region 1, 1996). This work looks at the RFD from the time it was established by King Rama V, to the Thai tradition that the forest belongs to the ruler of the region, who could grant permission to any person to log and would then collect levies.

⁴² Regarding the third generation in the environmental rights movement in Thailand, see Kulpol Polwan, *Development of Human Rights* (in Thai) (Bangkok: Winyuchon, 1995); Worapoj Wisarutpit, *Rights and Liberty in the Constitution: Limitation of Rights and Liberty* (in Thai) (Bangkok: Winyuchon, 1995).

⁴³ Sane Chammarik, *Development of Human Rights in Thailand* (in Thai) (Bangkok: Union for Civil Liberty, 1988).

6.1.2.2 The Concept of Property

The privileging of private property over public domain in the *Civil and Commercial Code* reveals a concept of property as a general principle, and that the *Civil and Commercial Code* is a major law governing the lives of ordinary people. Property in the *Code* is divided into two types: non-commercial and general.⁴⁴ This implies that the *Civil and Commercial Code* is intended to be applied to property that is transferable, as in commerce. At the same time, the *Civil and Commercial Code* was the fundamental law that applied to the concept of public domain long before the Thai legal system adopted the concept of public law. The concept of public domain is also embedded in the *Code* and applies to common property. This raises a question about characterizing CFM via the concept of property law and land rights, which will be discussed in section 6.2.2.4, below.

When we look at forests and CFM through the lens of property law, the concept of the forest can be seen to have changed over time, as has the concept of community. For example, government policy regarding land use and forest conservation changed from free access to restricted control. Changes in society also influenced the law. At the beginning, the law was based on the concept that the forest is waste land,⁴⁵ so that if no one occupies it, it reverts to the Crown. When government land management policy changed over time, this change played an important role in law enforcement in forest areas. For example, Sarit's administration during the period of the communist threat supported progress and development, with the government encouraging investment in unoccupied land and clearing more land for cultivation.⁴⁶ This shows how the forest was viewed differently by the law in each era. This will be discussed further in section 6.2.1.

Based on my field research interviews, government officers and lawyers view the concept of public domain as being under the public trust doctrine in Thai law. Similarly, villagers realize that they cannot own the land in the forest because it is a common heritage – but they can use and preserve the forest. The concept of public domain is still fundamental to the people's beliefs, so that no one will claim ownership over forest land unless they lived there before that land became a forest area. However, villagers know that they only have the right to stay, but

⁴⁴ *Civil and Commercial Code*, *supra* note 6, s. 106.

⁴⁵ From the definition of "forest" in the *Land Code*, s. 2, *infra*, and in the *Civil and Commercial Code*, s. 1304.

⁴⁶ See Pasakorn Chonhaurai, *Land Law: Text Book* (in Thai) (Bangkok: Niti Bannakarn, 1993).

not “own” the land. In addition, villagers want assurance that they can stay and use the forest as they did in the past before the land legally became a forest area.⁴⁷

Based on my interviews, government officers and lawyers compare forest lands to private property; private property has an owner who protects it, while the forest does not. This idea reflects the belief of government officers and lawyers that the forest is free for people to claim and occupy. This perspective leads to prejudice against people who live in the forest area as being selfish and greedy.⁴⁸ While private property has owners to maintain and protect it, public property, or the common good, tends to be exploited or abandoned. This same idea applies from different points of view. For instance, the villagers believe that if people can directly benefit from the forest, such as through CFM, they can collect non-timber products from the forest. The villagers will protect the forest as long as they can use it. However, the fundamental concept is that the forest still is part of the public domain. The only question is, what type of public domain: state property under the RFD, or communal land that the villagers can access and help to manage?⁴⁹

6.1.2.3 Communal Land

The concept in the north of using communal property still exists in the rural areas and this communal property requires maintenance, such as irrigation.⁵⁰ This concept is in contrast to the tragedy of the commons,⁵¹ which could happen if a community breaks down and the law of the commons does not function. The people protect natural resources because they can use and access them. If you exclude the people from using natural resources, they will not protect nature.

The main concept of communal property is that everyone can use it, but cannot transfer it to other person. This has been the legal tradition in northern Thailand for a long time.⁵² Because land is preserved for everybody in the community, it belongs to the commons.

⁴⁷ See Brenner, *supra* note 3.

⁴⁸ Interview with Chaiya, officer in the Academic Unit in the Regional Office of Conservation Areas in the DNWP (12 October 2010); interview with Wanchai, judge in the Supreme Court, Bangkok (16 November 2010).

⁴⁹ Interview with Keaw, *supra* note 34.

⁵⁰ See Lertwicha & Wichienkeo, *supra* note 29.

⁵¹ Garrett Hardin, “The Tragedy of the Commons” (1968) 162:3859 *Science*, New Series 1243.

⁵² Ganjanapan, *supra* note 36.

Common property is missing from Thai property law; although the *Civil and Commercial Code* mentions common property, this kind of property is under the jurisdiction of government agencies and is classified as state property rather than as common property.

This idea of using but not transferring land – the so-called “land bank” – has been used in the grassroots movement to resolve the problems of landless farmers.⁵³ The proposal is that the community should have land that a person in need can use for farming, and then, after that person does not want to farm anymore, the land is returned to the land bank and someone else can farm it. Later, this concept was adapted and became community land title. These two concepts of land use come from the northern custom of having communal land that everyone can use but are obliged to maintain. This development of the tradition was stressed by the civil rights movement for land rights and CFM was proposed as one of the solutions for expanding land use rights.

People in rural areas still maintain communal lands, so that when the economy is poor they have something to rely on. Land, natural resources, and local knowledge are social capital that rural people can use for subsistence when needed, as in the 1997 economic crisis in Thailand.⁵⁴ For example, villagers can harvest vegetables from the river bank, which is communal land. Also, the idea of common property maintenance still exists, as the villagers come together to fix their bamboo irrigation or clean up the streets for national holidays. This concept also applies to extinguishing forest fires. Hence, the villagers’ legal consciousness to use and maintain the common land exists. However, CFM requires more commitment over a long period of time. The question is how lawyers’ legal culture views this tradition. This custom might mean less to lawyers than legal action in the Court of Justice. As the legal commentary

⁵³ The basic concept is to have land for landless farmers. The fact that the land still belongs to the community, so that the farmer cannot transfer it, is currently a big problem in Thailand. When farmers sell their land they become landless. Another land use problem is land owners who have land but do nothing with it. The concept is that land is social capital that should be used in a productive way. The concept of the “land bank” began in 2003, when landless farmers in Lumphun Province trespassed onto private land that they claimed was subject to a fraudulent land deed. The owners eventually abandoned the land. However, the land was previously communal, so that it was impossible for anyone to legally own it. This issue became land reform propaganda for the farmers’ movement. Later, the land bank concept developed into community land title. See more about the land conflict in Lumphun Province: Northern Farmers’ Network, “News Release on Lumphun Land Conflicts” (in Thai) (7 August 2003), online: Thai NGO <<http://www.thaingo.org/cgi-bin/content/content3/show.pl?0211>>.

⁵⁴ Worawot Romrattanapan, *Social Capital: New Paradigm in Environmental Management* (in Thai) (Bangkok: Thammasart University, 2007).

provides a definition of “law” for the Thai legal system, this kind of custom may be excluded from the definition of “customary law”, but it can be considered to be folk law or living law.⁵⁵

6.1.2.4 What, Then, Do People Think about CFM?

Because some of the communities practising CFM are located in forest areas, which are considered to be Crown land or common property under Thai law,⁵⁶ it is *de jure* impossible to claim ownership and land title of such lands according to the private property concept.

When we think about how the villagers really treat CFM *de facto* in their community, this raises the issue of whether the land use in CFM areas is considered to be common property or private property. If the villagers rotate their cultivation areas, the concept of common property would seem to apply.⁵⁷ This is because when a person does not use that piece of land anymore, the land reverts to the community and anyone who wants to practise rotation cultivation can use that land. Some communities use GPS mapping to show which households occupy cultivated lands. If certain villagers no longer want to cultivate, the map will be updated and the land will revert to the commons, and anyone who does not have land for cultivation can use that land.⁵⁸ However, this practice varies between communities and depends on the regulations that the villagers establish. The example from Ban Khunte may be just one scenario, while Tambon Maetha does not have cultivation areas in their community forest (mostly, the villagers have land deeds⁵⁹) and Ban Huaieikhang does not yet have this kind of concept.

What do people think about their CFM? The villagers in the three selected cases protect and preserve their forests, while using some forest products for their households. They protect the forest from outsiders, from illegal logging and trespassing, while they also protect the forest from insiders who might expand the cultivation area. This leads to the legal perspective

⁵⁵ The reason I use the words “customary law”, “folk law”, and “living law” is because the Thai legal system has very narrow definitions of “customary law”. Therefore, I use the word “folk law” to indicate the traditions and practices that people feel committed to follow outside the written law. “Living law” encompasses the written law, unwritten law, and any action in society that people treat as law in everyday life.

⁵⁶ *Land Code*, Royal Thai Government Gazette 71:78 (30 November 1954), s. 2.

⁵⁷ Brenner, *supra* note 3 at 29-30.

⁵⁸ Interview with Khajon, male villager of Ban Khunte, Jomthong District, Chiang Mai Province (1 November 2010).

⁵⁹ This means the community is located outside the forest area and the residential land has private property status.

that the villagers exercise their land rights through CFM by using the forest while they participate in forest conservation. Indeed, the villagers want their rights to use the forest to be secured. Hence, CFM is one type of land right that the villagers look for.⁶⁰

6.1.3 The Law of CFM

“Law” in this section intentionally refers to every rule that people use to govern CFM that actually dictates people’s performance of CFM. This definition includes the villagers’ regulations. There are many layers of law concerning CFM: state law (see Chapter 3); folk law, including the villagers’ CFM regulations (see Chapter 4); and the beliefs and traditions that govern their CFM (see Chapter 5). The laws described in Chapter 3, both written and unwritten, function even more effectively than state law. However, this folk law or living law of the villagers still has a problem being accepted by lawyers and government officers, and sometimes by the members of their own communities. Moreover, in the practice of government officers, there is more than one kind of rule that they use, such as the Cabinet Resolution, to make their forest conservation job go smoothly, rather than enforcing the *Constitution* or strictly applying state forestry law. There are many questions about the law that people use to practice their CFM, and this next section will focus on three issues about the CFM regulations of the villagers and their legal status as customary law. The following section will also consider what the legal status of CFM regulations would be if they were not seen as being a form of customary law. Following that, the next section asks, “What is the legal status of a cabinet resolution about CFM as a written law?” Is it law or not according to Thai positivist legal concepts, or is it a living law that has more power over the people than the *Constitution*?

6.1.3.1 CFM as Customary Law

CFM practices and regulations are similar to customary law, only it is hard to find any implementation of customary law in the Thai legal system. Although Thai law hardly accepts customary law, in society there are practices that people just follow without written law. For example, people often pay gambling debts even though they are not legal debts and are not enforceable. In practice, there are common rules in society that people obey. This study calls this “living” law.

⁶⁰ Brenner, *supra* note 3 at 30-31.

What is CFM practice? Is it a norm, or custom? The main factor here is time. Custom requires a long period of practice and continuity. This is not the case with CFM that a community has decided to participate in recently. Actually, even more traditional CFM practices are not long-standing enough to be considered custom, even though the community may have lived on their lands for a long time and may have used the forest and practised their traditions there. This is because this form of CFM was constructed by adapting the traditions of forest people like the Karen and merging them with concepts from scholars and NGOs.⁶¹ The early CFM concept started in 1995.⁶² Before CFM was called CFM, the villagers just lived with the forest. There were forest management traditions, but these were not called CFM.

Unfortunately, the customary law (barely) recognized in the Thai legal system does not apply to CFM regulations. In Thai law, customary law can be applied only when there is no written law covering the situation. Mostly, written laws apply to nearly every situation. Moreover, there are more than 600 statutes and five major law codes in Thailand.⁶³ Almost everything is covered by written law. In this case, there are four forestry laws that apply to the forest. Therefore, the CFM tradition cannot be upheld in the court. However, there is a small chance that customary law regarding collecting mushrooms in some areas would be upheld, as some areas have a very long-standing tradition for doing so. However, this customary law implementation is based on the interpretation of section 4 of the *Civil and Commercial Code*.⁶⁴ The *National Forest Reserve Act 1964* states that non-timber products can only be collected with

⁶¹ For example, the Inter-Mountain Peoples' Education and Culture in Thailand Association (IMPECT) is an NGO that focuses on human rights issues for hill tribes in Thailand; see the Foundation for Ecological Recovery, online: Terraper <<http://www.terraper.org/home.php>>. This organization was founded in 1986 and its objective is to alert people about environmental problems, especially environmental issues arising from development projects and government natural resource management policies; see also The Center for People and Forests (RECOFTC), online: RECOFTC <<http://www.recoftc.org/site/>>. RECOFTC is an international organization that works with local communities actively managing forests in Asia and the Pacific to ensure optimal social, economic, and environmental benefits.

⁶² This was around the time that Sane Jammarik, Yos Santasombat, Anan Ganjanapan, and Borwarsak Uwanno conducted research about community and natural resources management; see Shalardchai Ramitanon, Anan Ganjanapan & Santita Ganjanapan, *Community Forest in Thailand: Development Alternatives* (in Thai), vol. 2, Sene Jammarik & Yos Santasombat, eds. (Bangkok: Local Development Institute, 1993).

⁶³ See a list of Thai statutes on the website of the Council of State, or *Krisdika*, online: Council of State, Government of Thailand <<http://www.krisdika.go.th/wps/portal/general>>.

⁶⁴ *Civil and Commercial Code*, *supra* note 6, s. 4.

the permission of RFD officers.⁶⁵ This small section only applies to non-timber products from the forest, not to overall CFM practice. In fact, the purpose of the *National Forest Reserve Act 1964* is to allow logging activity and collection of forest produce on a larger scale and to permit the Director General of the RFD to grant licensing. However, in PAs such as national parks and wildlife sanctuaries, the collection of forest products is prohibited.

Moreover, some practices do not occur over a long enough period of time to be considered customary. This includes the CFM regulations that adopted traditional rules and merged them with concepts learned from NGOs. The CFM practice that is written down in the CFM regulations is not treated as customary law in the Thai legal system.

What is CFM, then? I would call CFM “the law of the commons”, meaning the law of the people in a particular place in which a community establishes its own regulations for using and protecting their natural resources. Accordingly, folk law is not known much in the Thai legal system and it raises many questions as follows. How is this practice applied in Thai law? Where does folk law come from? What is folk law in the Thai legal system? Does it exist in Thai law? What is living law in the Thai legal system? Does it exist in Thai law? How does it apply? Since folk law is rarely mentioned in Thai law, and I assume it disappears in the positivist scheme, these questions will unfold when we discuss Thai legal culture in section 6.2.

6.1.3.2 What is the Legal Status of the Villagers’ CFM Regulations?

Villagers claim that their rights to practise CFM are constitutionally protected, and the *Constitution* is the source of authority for enacting CFM regulations. This is one way of explaining the legal source of law for CFM regulations.

In contrast, lawyers view villagers’ CFM regulations as illegal. Because CFM regulations conflict with statute law, they cannot be enforced, or are simply invalid. Accordingly, the written laws that lawyers use in this context are mainly the *Penal Code* and the state forestry laws.

However, my field research shows that villagers can efficiently enforce their own regulations. For example, the regulation prohibiting the sale of land to outsiders, which is totally contrary to Thai property rights, has been functioning very well. However, sometimes

⁶⁵ *National Forest Reserve Act 1964*, *supra* note 22, s.15 “Logging or collection of forest products in the national forest reserves shall be made after permission has been obtained from the competent officer or when permission has been granted by means of notification by the national forest reserves.”

there may be a lack of demand to buy the land or people may not be willing to sell their land because they need to live there and have no other place to go.

Another example of the effectiveness of CFM regulations despite their “illegality” is the example of the burning of the power saw in Ban Huaieikhang. The Ban Huaieikhang CFM regulations prohibit possession of power saws in the village. One man violated this rule by owning a power saw.⁶⁶ When the villagers and the CFM committee found out, they took the saw and burned it. The owner of the saw was angry but could not do anything because he knew that he had violated the regulations in his village and that the majority of the villagers had agreed to the rule. The owner of the power saw did not bring his case to the police because he did not want to live in hostility with his neighbours. According to state law, burning a power saw that belongs to another person is a wrongful act, and a person committing such an act can be charged under the criminal law for the offence of mischief and can be sued in civil law for tort.⁶⁷ So why does everyone comply with this rule, and how is this situation different from “kangaroo court”? One explanation is that the villagers all agree that power saws are bad because they cut trees too easily. However, it is possession of the power saw itself that is a wrongful act.

As folk law or the law of the commons, the villagers’ CFM regulations derive legitimacy from their processes and objectives. Regarding the process, the regulations were drafted by representatives from every village within the community and the process included a public hearing in the community.⁶⁸ Regarding the objective, the purpose of the regulations is to encourage people to participate in managing their natural resources, which is their constitutional right. The villagers’ CFM regulations are made by the collective in order to serve the needs of the collective interest.⁶⁹

⁶⁶ Interview with Ming, former community forest committee member in Ban Huaieikhang, Mae Wang District, Chiang Mai Province (21 October 2010).

⁶⁷ *Penal Code*, Royal Thai Government Gazette 73:95 (15 November 1956), s. 358; and *Civil and Commercial Code*, *supra* note 6, s. 420.

⁶⁸ Interview with Jamrat, community forest committee member of Tambon Maetha, Mae Orn District, Chiang Mai Province (28 October 2010); interview with Ming, *supra* note 66; interview with Nattawit, community forest committee member of Ban Khunte, Jomthong District, Chiang Mai Province (1 November 2010).

⁶⁹ Arun Agrawal, “Environmentality: Community, Intimate Government, and the Making of Environmental Subjects in Kumaon, India” (2005) 46:02 *Current Anthropology* 161 at 170-171.

However, in exercising these rights, the villagers cannot violate other people's rights, and must also exercise them according to the law. The villagers chose the *Constitution*, while the officers and the lawyers chose state forestry law. This resulted in a clash of legal cultures.

After the villagers realized the dilemma of the law enforcement that they faced resulting from this clash of laws, they adjusted their regulations by drafting them as a statute – effectively, their local administrative law. For example, in Tambon Maetha, when the headman got elected as the formal head of the TAO, he introduced CFM to other villages in Tambon Maetha, and the regulations of the CFM committee became the regulations of the TAO. This is simply incorporating the CFM regulations into the state law system. However, if the contents of the regulations still conflict with state forestry law and the criminal law, turning them into local administrative law does not automatically make them superior to the forestry law.⁷⁰

6.1.3.3 What is the Legal Status of a Cabinet Resolution?

There are two cabinet resolutions that are concerned with CFM. The first one is the Cabinet Resolution of *Wang Nam Khiaw*⁷¹ that accepts the concept that the people living in the forest have a subsistence livelihood and live in a harmonious way as forest stewards. The second one is the Cabinet Resolution of June 1998,⁷² which allows people who live in a forest area to stay and prove their legitimate rights if they were settled there before the forest area was gazetted. Unfortunately, these two cabinet resolutions provide excuses for government officers to cooperate with villagers rather than refer to the *Constitution*. Meanwhile, lawyers think of implementation of cabinet resolutions as an administrative action that government officers can take under the law. In this sense, state forestry law gives power to the General Director of the RFD and the DNWP to allow anyone to use forest lands under the rules of conservation practice.⁷³

⁷⁰ According to the hierarchy of laws in Thai legal system, the *Constitution* is the highest law, then statutes, then administrative orders. Local administrative law such as TAO law is considered to be statutory law, so it is at the same level as forestry law, which is also statutory law.

⁷¹ *Cabinet Resolution: Resolution on Forest Trespassing in Nakhornratchasima Province*, (22 April 1997), online: Cabinet, Government of Thailand <http://www.cabinet.thaigov.go.th/cc_main21.htm> [Cabinet Resolution].

⁷² *Cabinet Resolution: Solution on Land Conflict in Forest Areas*, (30 June 1998), online: Cabinet, Government of Thailand <http://www.cabinet.thaigov.go.th/cc_main21.htm> [Cabinet Resolution of June 1998].

⁷³ *National Forest Reserve Act*, *supra* note 22, s. 19 and *National Park Act 1961*, Royal Thai Government Gazette 78:80 (3 October 1961), s. 19 [*National Park Act*].

The prioritizing of cabinet resolutions over forestry statutes and the *Constitution* is totally contrary to the hierarchy rule in Thai law. Usually, a cabinet resolution is not a general law that can be applied to ordinary people. It typically only functions as an internal order within the administration.⁷⁴

Finding the reason why government officers preferentially apply cabinet resolutions is to discover their legal culture.

6.1.4 Procedures for Handling CFM

Although the courts apply written procedural law, the way that they handle cases about CFM implementation is different from what the law actually says.

6.1.4.1 Non-existent CFM Cases in Court

The main problem for CFM implementation is the non-existence of CFM cases in the Court of Justice. There are two missing pieces in the procedure. First, there is no CFM in the database system. Second, in cases involving villagers who have claimed their community rights under the *Constitution* to practise CFM, the court has not mentioned or ruled for or against this issue at all. Therefore, there are no legal principles that we can rely on in CFM cases. This will lead to further effects on CFM, such as lack of implementation in legal education and lack of recognition in the legal system. It will also influence the way Thai legal procedure handles CFM cases.

In general, legal education uses case analysis to deduce legal principles and critique the courts' legal reasoning. To find some cases that we want to research, we can go to a database in the court library and put the title of the statute at issue in the case, or the section under that statute. The result will be a list of the cases filed in the court that consider that statute or section. For example, the list may refer to cases about forest trespassing under section 19 of the *National Forest Reserve Act 1964*, or section 16 of the *National Park Act 1961*.⁷⁵ However, this process does not apply to CFM cases because there is no statute that governs CFM. Normally, the cases that are filed in court are listed by titles of the statutes that are relevant to the cases. Since CFM does not have any statutory support, CFM cases are filed under the

⁷⁴ Borwansak Uwanno, *Public Law Vol. 3: Souce of Law and Legal Method* (in Thai) (Bangkok: Nititham, 1995).

⁷⁵ *National Forest Reserve Act 1964*, *supra* note 22.

relevant forestry statutes. In addition, the list will not show section 46 of the *Constitution*⁷⁶ because the public prosecutor will not file a case under “the *Constitution*”. Hence, there will be no CFM cases searchable on the record.

To find CFM cases, we have to search where the case originated, which is in the community. When a villager in a CFM community is arrested, the other villagers in the community will tell their support groups, such as human rights lawyers or NGOs. Thus, the CFM case will be known among people who are interested in environmental issues. It might also be possible to find references to CFM cases in the mass media. Pati Ming from Ban Huaieikhang had his CFM case published in the mass media, and it became a well-known case. This is another way to find cases about CFM.

Moreover, there is no recognition of CFM in court decisions. The judges do not use the words “community forest” or “community rights” in these cases. CFM is only mentioned in the statement of defence if the defendant claims a right to practise CFM, or mentions that he or she had permission from the CFM committee. Nowhere do judges mention community rights or the *Constitution*. There is no light shed on the implementation of CFM in the court.

These two issues about non-existent CFM cases in the court raise questions about the missing piece in law implementation. Why do court decisions not mention the *Constitution* at all, even when the defendants claim their rights under the *Constitution*? Further, how can CFM be recognized in the Thai legal system and become accepted by state law beyond the *Constitution*?

6.1.4.2 Separation of Laws in Court

In my field research interviews with the lawyers, they claimed that the law of community rights under the *Constitution* does not belong in cases of violation of the forestry laws, which are criminal cases with criminal penalties.⁷⁷ CFM defendants are mainly charged under forestry statutes, which impose criminal penalties. As a result, the courts use criminal procedure in CFM cases. The separation of the courts since the enactment of the *Constitution of 1997* affects the implementation of CFM. Questions to answer are: What does the separation of the courts

⁷⁶ The section protecting a community's right to participate in natural resource conservation.

⁷⁷ Interview with Sakda, judge in Chiang Mai Provincial Court (15 October 2010); interview with Somporn, public prosecutor in Chiang Mai Provincial Court (19 October 2010).

really mean? And how does the separation of the courts and the law become distorted when applied to cases in practice?

6.1.4.3 Constitutional Cases in the Court of Justice

As CFM is subject to the *Constitution*, CFM cases should be considered to be constitutional cases. However, in practice, CFM cases are not considered to be constitutional cases, and this is the missing link in the adjudication system. The task is therefore to find out what has gone wrong with the procedure in constitutional cases. According to the *Constitution*,⁷⁸ people can file their cases under the *Constitution* with the Court of Justice or the Constitutional Court. However, law and its implementation are different in real life. General practice for filing constitutional cases is not really found in the system, especially in the Court of Justice. The villagers try to frame their cases as constitutional cases, but lawyers do not apply the constitutional law. In my interviews, the lawyers claimed that because constitutional cases are in the public law area, they should be heard in the Constitutional Court, not as general cases in an ordinary court like the Court of Justice. Why do the judges in the Court of Justice not apply CFM directly? What happens to the process?

Another strike against constitutional cases is bias. As a general rule, lawyers do not like uncertainty in the law.⁷⁹ They were trained to be specific when using the law; for example, criminal law has concrete principles and very clear components for each type of charge. Therefore, when it comes to constitutional law, the principles are new and there are not enough precedents relating to civil rights law. Moreover, the *Constitution* has been amended frequently, and such changes are often the result of politics.

6.1.4.4 No Guidelines for CFM Cases

Both government officers and lawyers argue that there are no guidelines to follow when prosecuting CFM cases. Therefore, they do not think of a CFM action as a formal legal action. In contrast, the villagers claim that the *Constitution* states that the people can use it directly if there is no statute that imposes any limitations on doing so. The practice of government officers and lawyers is attached to statute law, in this case forestry law and criminal procedure,

⁷⁸ *Constitution of 2007*, *supra* note 17, s. 28.

⁷⁹ Interview with Jakkree, lawyer in Bangkok (12 November 2010); interview with Nanda, lawyer in Chiang Mai (30 November 2010).

and these statutes seem to overrule the *Constitution*. What has gone wrong with law enforcement?

6.2 Formation of Thai Legal Culture

To understand the legal culture behind the black letter law, this section will use two approaches to find the elements shaping Thai legal culture with regard to CFM implementation. The first approach is based on time. I will use a timeline beginning from the time when Lanna was founded until the present. This first approach will illustrate the history of the community, legal system and the law concerning the forest within social contexts such as government policies so that we can see a dynamic picture. The second approach is to look at the construction of law enforcement. I define construction of the law in terms of institutions and their functions, for example: legal education, the adjudication system, commentaries of influential legal thinkers, and court decisions. In the second approach, I will focus more on the details of constructing legal behaviour and legal system mechanisms.

6.2.1 History, Movement, Colonization and Globalization of the Law about Communities and Forest Management

Using Michael M’Gonigle’s time- and space-based approach from his “A Dialectic of Centre and Territory”,⁸⁰ which I discussed in Chapter 2, section 2.3.3, I intend to answer the questions I asked in previous sections about community, CFM, the law and its implementation. I will use three milestones to divide time periods. The first milestone is the unification of Lanna and Siam by King Rama V, including the initial period of codification and administrative reform, and the founding of the RFD. This first point divides two time periods: the ancient time and modern Siam. The second milestone is the Revolution of 1932, which changed the country into a constitutional monarchy. After 1932, the country continued to develop; bureaucracies were created and globalization increased – until society needed to be reformed again. The third milestone is the era of political reform that started in 1992 after Black May.⁸¹ This era includes

⁸⁰ Michael M’Gonigle, “A Dialectic of Centre and Territory: The Political Economy of Ecological Flows and Spatial Relations” in Fred P. Gale & Michael M’Gonigle, eds., *Nature, Production, Power: Towards an Ecological Political Economy* (Cheltenham, UK: Edward Elgar, 2000) 3.

⁸¹ Black May was an incident in 1992 in which the military government of Suchinda Kraprayoon used force to stop middle-class people protesting against him. See Baker & Phongpaichit, *supra* note 33 at 233-245.

politicians being on alert, the grassroots movement to draft the “people’s constitution”, and the current climate of continuing political unrest.

6.2.1.1 Ancient Time: Before King Rama V

Formation of community. There were communities settled in this area of Chiang Mai and the Lumphun Valley since the pre-historic age; this was shown by archaeologists who discovered printing and handicrafts from this time.⁸² The original ethnic groups scattered around both the highlands and the valleys included the Karen and Lua. Later, Tai moved from the south of China and joined the Lua community. According to the Legend of Suwan Khumdeang⁸³ and the Legend of Chiang Sean – *Singhonnawat* – the Tai group was led by a prince and his elite, and this was the source of the hierarchical society the Tai thought was superior to the governance traditions of the Lua.⁸⁴ This hierarchy in community developed into an acceptance of the concept of master and servant, and also Tai developed the concept of “Thainess” – using Thai language and belief in Buddhism – and expanded among the communities of Chiang Mai and the Lumphun Valley.⁸⁵ Lanna was eventually developed loosely when the Tai community in this valley grew. This explains how the local Tai community was formed and instituted their traditions. We can see that they already had the concept of “servant”, which we see from the *Mangraisart*. King Mangrai founded Muang Chiang Mai, or Nakorn Ping (“city at Ping River”). Buddhism had been adopted from India and was now based in this community. Also, the *Law of Manu* was introduced and merged with local rules and became the *Mangraisart*; meanwhile, Ayutthaya received the *Law of Manu* as their *Dharmasart* and enforced it as their law. This explains the formation of their communities and their beliefs

⁸² Sarasawadee Ongsakul, *History of Lanna*, 6th ed. (in Thai) (Bangkok: Ammarin, 2007) at 34-45.

⁸³ In the northern legend, the story is about Chao Luang Khum Deang, who built the city of Jet Rin in the foothills of Doi Suthep, now Wat Jet Yot, Muang Chiang Mai. See “Vieng Jet Rin” (in Thai) Ponlamuang Nūa 4:218 (13-19 February 2006) 33.

Many of the local people still believe that the head ghost is Chao Luang Khum Deang, whose spirit protects Chiang Mai and lives in Chiang Dao Cave, in today’s Chiang Dao District, Chiang Mai Province. Every year, groups of shamans set up meetings and celebrate to pay respect to Chao Luang Khum Deang.

Doi Luang Chiang Dao has been part of Chiang Dao Wildlife Sanctuary since 1978. For information about natural resources from the perspective of the Wildlife Sanctuary Division (in Thai), see, online: DNWP <<http://web3.dnp.go.th/wildlifeweb/animConserveDepView.aspx?depld=5>>.

⁸⁴ Ongsakul, *supra* note 82 at 47.

⁸⁵ *Ibid.* at 47. In referring to “Thainess” I think the author intends to refer to Tai or Tai Yuan, who were lowlanders and lived in this area. Also, “Thai language” here means the northern Thai dialect.

about hierarchy, as well as their religious philosophies of Animism mixed with Buddhism and Hinduism.⁸⁶

Law enforcement. The law was based on the ruler's command and control, under both the *Mangraisart* and *Pra Aiyakarn Betset*. At that time, state power relied on the ruler and thus could sometimes not expand to the edge of the kingdom, although these ancient laws were enforced by the "man control" system. For example, under the *Mangraisart*, 10 commoners would have one Nai Sip, or "master of 10". Then this system grew until there was a Chao Saen, or "master of 100,000". This system was called "Pan Na", or "thousand rice paddies".⁸⁷ This was the governmental system in ancient times, a form of feudalism. The ruler or king appointed a headman to control the area of a thousand rice paddies (Pan Na) and sent tribute to the ruler for a period of time and helped when the network of Pan Na had to go to war.⁸⁸

The land belonged to the king. Although it was possible to mix the concepts of ownership with Crown title, the result was the same as if there had been no private land ownership. A person could occupy and use the land, but this right was terminated when that person left the land. The way of regulating communal land in the *Mangraisart* was unique; it was written that the lord, or the ruler in the community, could hold his land for the use of a community member. This law reflects a view of the commons that land was a resource of community production, not property, and everyone could use it. At that time, manpower was more important than land.⁸⁹ Land or territory was already under the ruler's control, as the king could take land from anyone and give land as a reward. There was plenty of land, but labour was important because it was

⁸⁶ Beliefs in the spiritual protection of place are derived from both Animism and Hinduism. Local Animists believe that spirit world has hierarchy: the house spirit and village spirit (*Sua Ban*) live in a large tree in the village, and then there is the spirit that protects the city (*Sua Muang*). Cities thus erect large pillars, called *Luk Muang*, where their city spirits can reside. These beliefs were mixed with Hindu concepts when the kingdom was founded; the king had a Brahman perform ceremonies for these spirits, and Chiang Mai, Ayutthaya, Thonburi, and Rattanakosin, all held similar ceremonies. Bangkok (Rattanakosin) has a *Luk Muang* near the Supreme Court at Sanam Luang near the Grand Palace. This shows that the belief in spiritual protection of places still persists in Thai society.

⁸⁷ The Pan Na system is connected to the name "Xishuangbanna", or "twelve thousand rice paddies", in the south of China. Also, the name "Lanna", or "million rice paddies", reflects the rice culture in the mountainous areas of northern Thailand, Laos, and southern China.

⁸⁸ Ongsakul, *supra* note 82 at 196-197.

⁸⁹ *Ibid.* at 198.

scarce and the ruler needed it to defend the kingdom. We can see this from the steep penalty applied to soldiers who escaped from their troops in wartime: they were executed.⁹⁰

However, if the law were too strict, people would leave the kingdom. For example, villagers from Tambon Maetha left Muang Chiang Mai to avoid tax and founded their village near the Maetha River.⁹¹ Moreover, the ruler at that time did not seriously enforce the law among the highlanders such as Karen and Hmong in the mountain areas where these hill tribe peoples moved around according to their traditions. These small, remote communities had their own traditions and laws. In the centre of the country, the ruler and the headmen functioned as judges who controlled the “man control” system in an orderly fashion. When there was a violation of the rules, the rulers were the ones who decided the case and the punishment.

Communities in Lanna were self-sufficient. The villagers produced for household consumption and helped themselves to communal resources such as irrigation. The ruler or king only used the law to provide peace in the kingdom and did not intervene much in the management of communities. Most communities were relatively independent, so Lanna did not impose high levies on its people.⁹² However, the ruler encouraged the people to produce more rice, as this meant the ruler could collect more tax. The *Mangraisart* created a tax exemption for three years for commoners who cleared forest land and turned it into rice paddies, so that they would have more rice paddies and could produce more rice and later could remit more tax. Also the concept of “Na Khum”, or communal agricultural lands, was intended to encourage production in the kingdom.⁹³ Therefore, the Lanna concept of land was that it was a common resource of production.

In Lanna, natural resources like forests became important when the British came through Burma during the early years of colonization.⁹⁴ In 1829, the British came to Lanna and traded

⁹⁰ *Mangraisart, Or the Law of King Mangrai* (Wat Saw Hai, Sarapuri Manuscript 1799) (in Thai), trans. by Prasert NaNakorn (Bangkok: History Department Srinakharinwirot University, 1978) at 2.

⁹¹ Tambon Maetha, *History of Tambon Maetha: From the Past to the Present* (in Thai) (Chiang Mai: Tambon Maetha Community, 2004) [unpublished].

⁹² Ongsakul, *supra* note 82 at 211.

⁹³ *Ibid.* at 213.

⁹⁴ The rise and fall of Lanna: King Mangrai ruled in the beginning of Lanna from 1296; then there was the golden age of Lanna (1355-1525); then the fall of Lanna when it became a colony of Burma (1558-1774); then Lanna became a colony of Siam (1558-1901); and then finally became part of the nation state of Siam in 1902.

with the people in the city, while requesting permission from the king of Lanna to do logging.⁹⁵ According to the concept of Crown land, all land, including forests, belonged to the king, so the British had to make a contract with the king to do logging. This was during the transition period after Lanna became a colony of Siam, although Lanna still mostly had authority to govern itself. In effect, Siam replaced Burma as Lanna's overseer and protector. After the *Bowring Treaty* in 1855, Lanna increased trade with the British, particularly with two British companies, British Borneo and Bombay Burmah.⁹⁶ However, it was a problem that there were no rules governing the forest. The forest was an asset of the king of Lanna, and the king would occasionally just revoke a contract. The British companies complained to Siam as that this was corrupt and filed a case with the British Consulate in Bangkok, because, at that time, extraterritorial adjudication had already begun. There were many cases involving forest disputes until Siam declared that the forest in the entire kingdom of Siam, which at that time already included Lanna, was under the control of the central government. This marked the end of the control over the forest by the Lanna king.⁹⁷

In short, natural resources were controlled by the ruler as far as his power could reach, as when the Lanna king granted logging concessions to the British, which affected villagers as it took away their resources. Meanwhile, collective action among the hill tribes and lowlander communities was strong because villagers had to help themselves since the government rarely intervened; they only collected tax and provided security. The remote communities became increasingly independent because the ruler's power was not strong enough to reach into the remote areas and also because the ruler had less interest in those kinds of communities. In terms of religion, people's beliefs were based on Animism mixed with Buddhism.

6.2.1.2 From King Rama V to Revolution in 1932

During the reign of King Rama V, Siam was in a transition period, as the country needed reform in many areas. The most important issue at that time was reforming the legal system, along with the administration⁹⁸ and communications.⁹⁹ The country was in a boom period. In

⁹⁵ Ongsakul, *supra* note 82 at 341.

⁹⁶ *Ibid.* at 389.

⁹⁷ *Ibid.* at 394.

⁹⁸ Siamese administration reformed the "two systems" (military and civilian) and the four systems (the palace, the city, agriculture, and finance) in the Ayutthaya period. These were changed to the regional system and the ministry system.

this era, more power was centralized in Bangkok, and the regime of government was transformed to an absolute monarchy.¹⁰⁰

All policy making was directed to Bangkok, and more administrative officers were appointed to be stationed in Chiang Mai. The *Treaty of Chiengmai* (14 January 1874), made when Lanna was still a colony of Siam, governed the three main cities in the north: Chiang Mai, Lumphon, and Lumpang, which were under control of Siam. This treaty obliged the Siamese administration to have an adjudication about a dispute concerning the lumber business with the British at Chiang Mai.¹⁰¹ The second expansion of control from Siam was the appointment of a governor by the Siamese king, to be stationed in Chiang Mai from 1884-99. At this time, Lanna was still a colony of Siam, but had less self-determination than before and was more directly controlled by the governor. Especially in lumber licensing and adjudication, the Siamese governor had more control because the British wanted Siam to resolve the problem of the Chiang Mai ruler's corruption.¹⁰² Finally, Siam founded the Royal Forest Department in 1896 and employed a British expert to be the Director General. Later, the administrative reformation of the regional governmental system ended the colonial system of Siam in Lanna. This regional governmental system, or "Monthon Thesapiban", applied from 1899 until 1933, when Siam became a constitutional monarchy. Local administration was governed by the *Law on Local Administration of 1914*.¹⁰³ This statute established a formal form of local administration in the same pattern throughout the kingdom, creating the divisions of village (*Moo Ban*), subdistrict (*Tambon*), and district (*Amphor*).

Trade with the British changed the Lanna self-sufficient economy into a capitalist economy. Natural resources were exploited mainly for export to Britain. When Siam strictly enforced the *Bowring Treaty*, the local people and ethnic minorities in the highlands, such as the Tai Yai (Shan), an ethnic group that lived in the mountainous area between Lanna and Burma, were excluded from Siamese citizenship if they chose to be under British control. Land

⁹⁹ King Rama V established communication systems, building the railway, telecommunications, post offices, and roads to the north, south, north-east, and east.

¹⁰⁰ Ongsakul, *supra* note 82 at 409.

¹⁰¹ This became the very first adjudication that Siam had after signing the *Bowring Treaty*, *ibid.* at 412 – 413.

¹⁰² The strict control of lumber licensing by Siam, which was previously controlled by the Lanna ruler, plus direct taxation from Bangkok, caused economic difficulties for the elite in Lanna. Also, more control from Bangkok led to more rebellion and resistance from local people and the hill tribes, such as the Karen, on the border with Burma. *Ibid.* at 430-435.

¹⁰³ *Law on Local Administration of 1914*, Royal Thai Government Gazette 31 (17 July 1914) 229.

owners were excluded from having non-Siamese status and forest products were preserved to be exploited in the lumber business with the British. These became important changes for the local communities as their access to timber and forest resources were reduced. Although Lanna previously had a concept of Crown land, in practice the local communities could gather forest products for their household use. However, when the lumber business arrived, the local people could no longer use the forest. As well, the economic system changed to a merchandise-based one. Plantations grew products for export, such as tea and tobacco.

The class system was restructured when King Rama V eventually ended slavery. In the past, there were three classes of people in Lanna: "Chao", "Prai", and "That". The elite class included the royal family, Chao,¹⁰⁴ and also lords by appointment of the king: Praya, Chao Praya, etc. The commoners were called Prai; they were free people but were registered under a control system. Sometimes commoners had to be recruited to work for the lord and the king. The last class was slaves, or That. Commoners could sell themselves, or parents could sell their children, to repay their debts. Slaves were the property of their masters. After King Rama V abolished slavery,¹⁰⁵ everyone in Siam was a free person. The labour force registry remained only for the commoners in the military; every man had to register in the military. Class divisions still exist in modern Thai society.

The education system for commoners had been reformed; the school system replaced the practice of receiving education from monks in temples.¹⁰⁶ Siamese strategies for building the education system included harmonizing people and uniting the ethnic groups together. In school, teachers had to teach Thai language and embedded "Thainess" to students. Many private schools were established by missionaries for the elite in Lanna. The king sent his sons and nephews to elite schools in Bangkok; also, top students received scholarships from the government to study abroad, mainly in England and France. The first university, Chulalongkorn

¹⁰⁴ "Royal" in this sense means all the rulers' families: in Lanna: Chiang Mai, Lumpang, Lumphon, Nan, Prae, Chiang Rai; and in Siam: Ayutthaya then Rattanakosin.

¹⁰⁵ The *Royal Order Concerning Slavery in the Northwest Region* (21 September 1900) systematically abolished slavery; first, it reduced the price for slaves so that they could redeem themselves; second, slaves were to retire at the age of 60; third, everyone who was born into slavery after December 16, 1897 would be freed, and no one could sell himself or herself (or others) as a slave after that date. The complete abolishment of slavery took more than 10 years, but no violence accompanied the process as in so many other countries. See Ongsakul, *supra* note 82 at 513.

¹⁰⁶ In the past, basic education for commoners consisted of learning to read and write from monks at the temples. Elites sent their children to get higher education in Burma. Lanna was closer to Burma and Lan Chang (Luang PraBang, Laos) rather than to Siam.

University, was founded in the reign of King Rama VI by original order of King Rama V. The education system led to the creation of modern Siam, which opened to “civilization” and tried to blend local culture and identity into the centralist Siamese ideology.¹⁰⁷

The legal system was substantially reformed. After Lanna became part of Siam, the legal system was obliged by the *Chiengmai Treaty* to locate courts in Chiang Mai to settle disputes with the British, while the local justice system was still under the ruler of adjudicators. After Siam reformed the governmental system to Monthon Thesapiban, or the regional system, the governor appointed to Bangkok, as well as the court system, were united and directed by the Justice Minister. King Rama V also ordered that the law had to be applied as universal law throughout the Kingdom of Siam. The land ownership system was introduced under the *Civil and Commercial Code* and the land title and registry system was instituted under the *Land Code*. Also, the forest came under the jurisdiction of the RFD.

This second milestone of social change united the national system in every aspect: government, law, education and transportation. Regulation of natural resources became centralized to Bangkok and local communities were restructured as hegemonic systems from central Bangkok. The law had been unified. Local culture, which was viewed as “other”, was slated for eradication and replacement by “civilization” and Westernization.

6.2.1.3 From Revolution in 1932 to Political Reform in 1995

In the latter years of the reign of King Rama VI, Siam faced an economic crisis. During the reign of King Rama VII, there were occasional conflicts with bureaucrats because the budget cuts increased tension between the king and his government. After some Thais who were educated in Western countries came back and worked in the government bureau, the idea of revolution to bring democracy and development to Siam erupted and led to changing the regime from being an absolute monarchy to being a constitutional monarchy on June 24, 1932.

Expansion of the state’s power and control reached to all levels of bureaucracy, since there were reforms of the local administration in every village and district.¹⁰⁸ The culture and community rights of the people in Lanna were changed according to the central government’s policies. The first change was the centralization and decentralization in the *Public Administration Act 1933* under Pridi Phanomyong’s draft which applied the French concept of

¹⁰⁷ Ongsakul, *supra* note 82 at 469; Baker & Phongpaichit, *supra* note 33 at 105-107.

¹⁰⁸ Ongsakul, *supra* note 81 at 555.

déconcentration. The law divided the government bureau into three branches: central (ministry and department), regional (province, district, and subdistrict), and local (municipal).

After Siam changed the regime of government, the situation in the north was relatively poor. People did not have much income and the government could not provide basic infrastructure. Agriculturalists faced drought for a long time. The government tried to develop industry – such as the sugar factory in Lumpang¹⁰⁹ – in many regions of the country. The first priority of the country was agriculture. The government built small irrigation systems to support farmers. Irrigation by the government dominated the community's irrigation system. Since this time, small-scale farmers have had to rely on the government administration of water, and this has destroyed community management of the resource. Tobacco was the main crop that the government encouraged the farmers to grow, and they also built a tobacco factory.¹¹⁰

Under Field Marshall Plaek Phibunsongkhram's rule (1938-1944), the government promoted an extremely nationalist policy. This nationalist policy undermined local cultures and traditions and tried to mould the people into a government-created image of "Thai" behaviour, in language, manners, life style, and work.¹¹¹ According to nationalist policy, many public enterprises were founded and privately owned land, especially land owned by foreigners, was nationalized. Many laws enacted to preserve jobs and businesses were for Thais only. Land ownership was also only granted to Thai citizens.

During WWII, Thailand lost some its territory in the north to the French, and the Japanese also invaded the north and some other parts of Thailand. Western lumber business owners had to flee and the Thai government took over the lumber businesses and gave them to Thai sub-contractors; however, the lumber business did not operate successfully because of the high cost during wartime. After the war, the Westerners came back to their businesses again because their licences were still valid.¹¹² Business after wartime was back up because of the increasing role of Chinese merchandise. The cities expanded rapidly after the country recovered from the

¹⁰⁹ *Ibid.* at 561.

¹¹⁰ At that time, Siam imported a great deal of tobacco, so the government resolved this problem by promoting tobacco plantations and government-owned tobacco factories to increase government income. This led to a new problem of over-exploitation of natural resources. In Chapter 4, it was noted that, as Ban Maetha experienced, tobacco production resulted in cutting down trees for firewood.

¹¹¹ See Ongsakul, *supra* note 82 at 565-573; see also Baker & Phongpaichit, *supra* note 33 at 126-135.

¹¹² Ongsakul, *ibid.* at 577.

war. Government infrastructure, such as the Department of Highways, the Department of Rural Development, and the Thai Post, were expanded to support rural areas. More infrastructure organizations were established by law as state enterprises: for example, the Communication Authority of Thailand, the Telephone Organization of Thailand, the Electricity Generating Authority of Thailand, the Metropolitan Electricity Authority, the Provincial Electricity Authority, the Metropolitan Water Authority, and the Provincial Water Authority. Sarit Thanarat's slogan on country development was "Running water, electricity, good roads, and job creation." State power expanded and reached the grassroots in remote areas.

During Field Marshall Sarit Thanarat's era, the government founded Chiang Mai University and expanded Chiang Mai zoning. Because the government promoted investment in the north, the need for land use was highly increased and the land prices were much higher than before. Rice fields near urban areas became real estate development projects, such as housing and entertainment projects. Many local newspapers started their businesses. The government initialized the National Economic and Social Development plan as a four-year plan in 1961.¹¹³ The government amended the *Land Code* by revoking the limitation on owning land.¹¹⁴ Land became a commodity and poor people could not afford to own land, and had to push further into remote areas – the forest. Moreover, the forest also became a commodity. The *National Park Act 1961* was enacted, intending to expand the tourist business and income for the government, along with promoting conservation.

The conservation movement in Thailand started after WWII, when wildlife was being over-hunted, and one prominent individual, Boonsong Lekakul, alerted people about the need for conservation. He and the Association for the Conservation of Wildlife in Thailand met with Thanarat about the necessity of having conservation laws in Thailand. Because of Lekakul's advocacy, Thanarat enacted two conservation laws: the *Wildlife Protection Act 1960* (amended 1992) and the *National Park Act 1961*. Later, Lekakul founded the World Wildlife Fund

¹¹³ Online: Office of the National Economic and Social Development Board, Government of Thailand <<http://www.nesdb.go.th/Default.aspx?tabid=62>>.

¹¹⁴ In the *Land Code*, there were limitations to owning land: 50 rai for agriculture, 10 rai for housing. This section was later deleted; the government and the Parliament tried to bring it back but never succeeded. Now, a person can own unlimited land and this leads to many problems of land use and land allocation. The Sarit government explained their objective in taking this action as encouraging investment in order to expand economic growth on a larger scale.

(Thailand) and became known as a pioneer conservationist.¹¹⁵ He inspired many other conservationists in Thailand, and his movement was the first to introduce the concept of conservation in Thailand.¹¹⁶

After the Revolution of 1932, the People's Party or "Khana Rasadorn", was ruled by a combination of military officers, such as Praya Phahon-phonphayahasena and Plaek Phibunsongkhram, and civilians, such as Pridi Phanomyong and Seni Pramoj. The political ideology was influenced by those educated in the West, such as Phanomyong (France) and Pramoj (England). Thammasart University was founded by Pridi. After Plaek ended his rule, this was the end of the power of the People's Party. In the Thanarat era, the original Thai version of administration was employed. Thailand used the interim constitution from the Thanarat coup, which granted emergency powers to the Prime Minister. This was the so-called "section 16", which was adopted from the French constitution, and Thanarat used this section to order executions by public firing squad. After Thanarat retired, power was transferred to Field Marshall Thanom Kittihachorn. Under his leadership, rumours of government corruption were widespread. Thailand was under a military government, the so-called "semi-democracy", as elections were fraudulent – and then there was the government coup itself. The interim constitution was used for nearly 10 years. Freedom of expression was limited and many opponents of the government "disappeared" or were shot. The people demanded a re-election and a new constitution. The political crisis peaked when students from Thammasart University who had demanded the new constitution were arrested. Mass protests erupted on October 14, 1973. Kittihachorn, the Prime Minister, resigned and was exiled. King Rama IX appointed Sanya Thammasak as interim Prime Minister and drafted the new constitution.

After the new constitution and elections were set up, the civilian government operated for a while. The Cold War in the West was increasingly intense. Americans stationed troops in Thailand during the Vietnam War. Thailand was alert to the communist threat. The political situation nursed a right-wing atmosphere. The government, via the Border Patrol Police, founded the Village Scouts in 1971. In the rural northern areas, peasants rallied, requesting

¹¹⁵ Jeffrey A. McNeely, "Dr. Boonsong Lekakul: Lessons from the People's Conservationist" (February 2007), online: Boonsong Conservation Thailand <<http://www.boonsongconservationthailand.com/view.php?cid=13&catid=25>>.

¹¹⁶ Three decades later, the conservation concept was sparked again under the government of Anand Panyarachun in 1992, who was the Thai ambassador to the UNEP. A conservation group made a proposal to enact the *Environmental Protection Law of 1992, infra*.

government help because of the higher prices of rice and because of issues with land allocation. The Peasants' Federation of Thailand (PFT) was founded in 1974.¹¹⁷ In that same year, the government founded the Agricultural Land Reform Office,¹¹⁸ and enacted laws concerning agricultural advocacy known as the *Rice Paddy Rental Control Act of 1974*.¹¹⁹ The democratic atmosphere was fertile while, at the same time, the rightists' propaganda also increased.

The political crisis erupted again and this time was worse than in 1973 when Kittihachorn came back to Thailand as a monk and stayed at the Royal Temple. Students protested at Thammasart University, but this time the consequences were the reverse of those in 1973. On October 16, 1976, violence began. The King made an appearance on television, requesting an end to the violence and appointing interim Prime Minister Thanin Krivixian. After that, Thailand was under a military shadow for a long time. Students who survived Thammasart fled to the jungles to take refuge. The Thai government tried to cope with the "communist threat" propaganda. General Prem Tinsulanond became Prime Minister of a civilian government for eight years. National security was the mainstay of the government's policy. In the forest, hill tribes' opium plantations were replaced by cash crops. The Border Patrol Police helped provide schools in the mountain areas and taught basic Thai to the hill tribes. The royal projects introduced forest and water management to help the hill tribes. The government launched a policy that pursued the students who fled in October 1976 and others who escaped to the jungle due to accusations of communism, demanding that they come back. This was known as Prime Ministerial (PM) Order 66/23 – the anti-communist insurgency policy.¹²⁰ The obsession with national security affected the communities in the mountain areas. Community forest concepts were introduced in Doi Suthep, Chiang Mai, where the villagers protected their forest from trespassing by businessmen. The CFM movement had begun.

After the Tinsulanond era, Thailand had a civilian government once again. Chatchai Choonhawan promoted economic growth under the Newly Industrialized Country (NIC) policy. In fact, Thailand's economy was growing rapidly. Land prices were extremely high. Tourism was the main objective in the north, both in terms of resort sites and local eco-tourism

¹¹⁷ Baker & Phongpaichit, *supra* note 33 at 189.

¹¹⁸ *Agricultural Land Reform Act 1975*, Royal Thai Government Gazette 54:10 (5 March 1975).

¹¹⁹ Replaced by the *Agricultural Land Rental Control Act 1981* (9 August 1981).

¹²⁰ Chaiwat Satha-Anand, "Forgiveness as a Nonviolent Security Policy: An Analysis of Thai Prime Ministerial Order 66/23" (2002) 21:2 *Social Alternatives* 29.

businesses. The government's agenda on law and development focused on privatization and deregulation. Many public laws on public enterprises were subject to revision. The ruling politicians in this era intended to reduce government intervention, which had expanded in the Phibunsongkhram-Thanarat and Tinsulanond eras. Capitalism was at a high level due to government promotion of economic and business sectors and exploitation of natural resources. As a result, there were more landless farmers, more resorts in the forest, more skyrocketing land prices, and more villagers looking for work in the city.

The Choonhawan government also created a resettlement project for the poor, known as "Khor Jor Kor" (from "Khronkarn Jatsan Thidin Thamkin Pur Pho Yakrai" or "Resettlement and Land Allocation for the Poor People Living in the Forest Area").¹²¹ The project used military force to relocate villagers, and this led to massive resistance against the project until it was finally abandoned. Afterwards, the government developed another policy to promote eucalyptus plantations by licensing businesses to export paper to China. Again, the project raised many controversial issues about soil degradation and unsuitable plants for the Thai forest – and about corruption in the process of licensing. Finally, the project was dropped.

This high level of economic growth in Thailand was suddenly halted by the coup in 1991 led by General Suchinda Kraprayoon. To avoid criticism, Kraprayoon asked Anand Panyarachun, a successful businessman, to be the Prime Minister. Panyarachun's government was accepted by the people. Many projects concerning natural resource conservation and environmental law were put into place. Thailand became increasingly involved in international organizations such as the UNDP and UNEP. Government reformed the administration in the name of good governance and transparency. Public law and people's participation developed and middle-class politics expanded more than in the past, when politics was a game of the elites. After an election, Kraprayoon became Prime Minister, and this spurred public resistance from people who believed that he had held the coup only to seek power for himself.

Protesters from the middle class increased tension, gathering in many places around Bangkok until the military used force to disperse the protesters from May 17-20, 1992. This incident became known as Black May.¹²² After the situation calmed down, an election was held and Chuan Leekpai became Prime Minister, with the promise of political reform and drafting of

¹²¹ "Khor Jor Kor" (in Thai), *Manager News* (November 1991), online: Manager News <<http://www.gotomanager.com/news/details.aspx?id=7197>>.

¹²² Baker & Phongpaichit, *supra* note 33 at 243-246; Suwannathat-Pain, *supra* note 33 at 177-179.

a new constitution. The political atmosphere at that time was highly energetic. The civil society concept had caught the people's attention. Prawase Wasi and Theerayut Boonmee published books and comments in mass media to support the concept of people's participation in civil society. NGOs and people's movements tried to push their issues so that people's rights were considered. The National Assembly on Constitutional Drafting established public hearings set in every region of the country. Many issues from the people and human rights groups were sent to the drafting committee, including the community right to participate in natural resource management. Many public constitutional laws and administrative laws had been drafted to be enacted after the constitutional enforcement. On October 11, 1997, the "people's constitution" was adopted by the Parliament.

In summary, this era lasted from the Revolution of 1932 until political reform in 1995. Northern communities changed under the government policies on national security and nationalism, then as a result of development and, last, because of the civil society movement. Lands and forests became commodities under the capitalist orientation of economic development. Public law experienced a golden age when the government expanded the state's role in production and infrastructure, and then declined when privatization policies were implemented, then flourished again during the political reforms, when public law was used as a legal mechanism.

6.2.1.4 Constitutional Reform to Political Unrest

After the proclamation of the *Constitution of 1997*, the contest for legal implementation began. Cases on constitutional rights were being filed with the Court of Justice, the Administrative Court and the Constitutional Court. Some claimants won, but some lost. So far, CFM cases have failed to meet the standard. The movement to create the *Community Forest Bill* resulted in a petition that was submitted to the Parliament in 1998, along with the draft from the RFD. Then the Parliament dissolved the *Bill* and went back to the drawing board again. After 11 years of uncertainty, the *Bill* passed the National Legislative Assembly, but then the *Bill* was brought to the Constitutional Court. After a group of bills passed at the end of the session of the National Legislative Assembly, they rushed to push as many bills as they could, so the quorum was short. Therefore, the Constitutional Court declared that set of bills as unconstitutional because of quorum disqualification.

In terms of the general sphere of politics, Taksin Shinawat won a majority government, as the *Constitution* stipulated there should be a strong executive Prime Minister. The government's policies became very popular with the grassroots, as they provided more effective outcomes with respect to social health and welfare, OTOP (One Tambon One Product), and community funding (*Kong Thon Moo Ban*). Local administration was gaining an increasing role in development. After the economic crisis, many people went back to their hometowns and participated in job creation in their communities. Community culture was booming again. However, Shinawat was ousted in a coup on September 19, 2006.

From the constitutional law perspective, the functional system of the *Constitution of 1997* was not enforced as it should have been. The executive power was too strong. In the meantime, other organizations such as the Counter-Corruption Committee could not catch and could not deal with the policy abuses. The people's rights under the *Constitution* were still being violated, for example, in the war on drugs policy by Shinawat. Over time, based on the *Constitution*, the judiciary has become bigger and has expanded its power. Judicial review has triumphed over the executive and the legislative branches. Some critics call this "judicial activism".¹²³

Politics in Thailand divide the people into fragmented groups: Red Shirts, Yellow, Pink etc. The rural and city ideologies are at odds. Elite, middle-class, and grassroots people are distrustful of each other, and the blame game obstructs the flow of development. Bureaucrats distrust politicians. The anti-royalist underground is against the royalists. *Lese majeste* law has become a tool to get rid of the opposition. Views on Shinawat easily spur conflict in the country. No solution is in sight.

Grassroots and indigenous peoples' movements continue. The hill tribe peoples have formed the Indigenous Peoples' Assembly of Thailand and arrange meetings annually. The landless farmers have demanded land reform action from the government. The Communal Land Title Committee was established and has started to grant communal land title to communities. Meanwhile, global warming and carbon credits in environmental cases are still enforced against persons who are prosecuted for forest trespassing and deforestation.

¹²³ Pichet Moalanond, Nilubon Chaiittiporn & Porntip Apisittiwassana, *Judicial Review (Mirror Reflecting the Thai Judiciary)* (in Thai) (Bangkok: National Health Foundation, 2007).

6.2.1.5 Analysis of Legal and Social Change in the Formation of Legal Culture in Thailand

Thai history in the four eras as described above shows that Thai society and law have changed over time. The first major change was legal codification, which modernized the Thai legal system. The second revolutionary change was the *coup d'état* in 1932 that brought constitutional law to Thailand. The third change was the transformation of land and natural resource management. Finally, the last major change has been the development of social structures in communities in forest areas, especially in hill tribe communities.

The codification of the law during the time of King Rama V was an internal change to the legal system that resulted from several causes, including the threat of colonization, and attempts to reform the legal system initiated by the King himself. These attempts followed the trend of modernization in Western countries where Thai elites had completed their studies; upon returning home they tried to change Siam into a “civilized” country. Legal transplants entered Thai law through codification and, following that, many other laws were remodelled as globalization increased. This change in the legal system had an enormous effect on Thai society and social structure. For example, the laws on juristic persons, property, juristic acts, and families in Thai society became standardized as in many other countries with modernized laws. Ancient legal institutions were also reformed, and replaced with modern judicial institutions. Five major law codes were enacted and began their roles in modern Thai legal culture: the positivistic civil law system.

The constitution introduced in 1932 was the starting point for democracy in Thailand. Since then, the *Constitution* has become, theoretically, a fundamental source of law. Political institutions have been established, namely Parliament, government, and the Court of Justice, as the three pillars of democracy – and the monarch. However, as Nidhi Eoseewong points out, these formal political institutions have functioned in the shadow of the “cultural constitution”.¹²⁴ In practice, the *Constitution* has never superseded other legislation in the everyday lives of the people. Using the concept of the cultural constitution merged with the living law concept, the civil rights movement established a marginalized people’s alliance among the poor, landless farmers, and indigenous peoples. This group was established during the students’ uprising in the 1970s and, in the mid-1990s, a grassroots movement of people demanding their rights under the Thai *Constitution* was established. NGOs and the grassroots

¹²⁴ Nidhi Eoseewong, “The Thai Cultural Constitution” in *Thai Nationality, Country, Textbooks, and Monuments* (in Thai) (Bangkok: Matichon, 1995) at 136.

movement made minor changes in law and society and used the *Constitution* as their legal tool to bargain with the elites.

Land management and natural resources law transformed the feudal system by creating a modern land registry and by classifying land based on Roman law. Real property under the civil law became either state property, common property, or private property, while Crown land was classified as a mixture of state property and common property. The law governing natural resources uses the concept of common property under the public trust doctrine and is based on state power exercised through government agencies authorized by legislation. After state power expanded to cover the entire country, free access to natural resources for remote communities was eventually undermined.

Development projects in forest areas have modified communities that live in the forest, especially hill tribe peoples. There are many types of communities: traditional communities, instrumental communities and modern communities. From ancient times, communities in remote areas chose not to be governed by central rulers, so they fled and lived in the forest.¹²⁵ Eventually, when state power had fully expanded throughout the country in the 1960s, state law took control over natural resource management. While these remote communities were excluded by the central government, they still used state law, such as the *Constitution* and forestry law, to protect their rights to practise natural resource management, including CFM.

Looking at the history of legal and social change provides a dynamic macro view of the Thai legal system. To complete the analysis of Thai legal culture, I will next examine internal legal culture.

6.2.2 The Contexts of Law Enforcement

In this section, I will analyze factors that influence the legal culture and law enforcement coming from inside the legal culture. The first factor is the origin of the law. How were laws enacted, and what was the reason for creating them? Sometimes a law is technically in effect but is not being used. It just sits there, untouched. One reason for this is that the original law makers and users might be from a different era. For this reason, laws should be changed as society changes. However, sometimes the law making process does not follow the needs of society. This first factor will be outlined in section 6.2.2.1, where I will focus on the context of law making concerning CFM.

¹²⁵ Scott, *supra* note 40.

The second factor, which will be described further in 6.2.2.2, is legal education. In shaping and determining the legal culture of lawyers, I think legal education is key. Through understanding legal education, we can see what kinds of lawyers society has produced. The next factor is legal institutes. After lawyers graduate, they practice through the Law Society. How does the Law Society shape the way lawyers use the law? The fourth factor is textbooks and commentaries as influential sources for interpreting the law and embedding the rules of law for lawyers. The last factor is court decisions. Although the Thai legal system is not a common law system, meaning case law does not create binding precedent, it shows how the law is applied and can reflect the legal culture.

6.2.2.1 Law - Making

As mentioned previously in the section on the historical contexts of Thai society, the laws concerning CFM were created at different times and for different reasons. The first laws concerning CFM were the *Land Code* and *Civil and Commercial Code* enacted by King Rama V. These laws went through a long process of drafting, and eventually became the pillars of the Thai legal system.

The second group of relevant laws are the forestry laws: the *Forest Act 1941*, the *National Forest Reserve Act 1964*, the *Wildlife Protection Act 1960*, and the *National Park Act 1961*. These laws were enacted during the military government at the suggestion of the pioneer conservationist Boonsong Lekakul. These were upper-class law concepts and the government officers supported their enforcement. The users of the law are the government agencies, who have direct authority. However, when we look at this law in the sense of its implementation in the forest, the villagers still live in the forest and hunt wild animals. This law does not work for the villagers, as they do not have legal consciousness of this law. The classic reason is that the law is not compatible with the culture of the people. The question is, if the law is supposed to be a form of social engineering, how can the law create change in society when it is against the culture of the people? Someone will need to decide whether the law is a stick or a carrot.

Another environmental law repeats the forestry law experience. The *Environmental Protection Act* was enacted during the Panyarachun government, which was under a Parliament manipulated by the military. This law would not likely have passed through Parliament under "normal" circumstances, i.e. under control of civilian MPs and elite senators, because it contains many controls for factory pollution monitoring systems. This law was proposed by

conservationists as a result of pressure from international environmental organizations that had connections to the Prime Minister.¹²⁶

For these two groups of conservation laws, the process was initiated by the educated elements of social movements and passed by the united members of Parliament.

The *Agricultural Land Reform Act 1975*, a “law of the people”, was passed in Parliament after the incident in October 1973 when the students’ uprising against the military government was successful, and the public atmosphere was full of democracy. I connect this law with CFM because it was based on the people’s movement and on land rights for the people. The road to becoming legislation for the people’s law was long. Similarly, the process of collecting petition signatures and submitting the *Community Forest Bill* to Parliament took nearly 10 years. The Parliament discussed the *Bill*, it passed the House of Representatives, then went to the Senate, then was drafted by a committee made up of members from both houses. Before the *Bill* passed, the Parliament was dissolved. Moreover, the *Bill* went through more than one draft, a draft by the people and a draft by the RFD. Finally, the *Bill* was distorted from the original draft, so that it was not the people’s bill anymore.

Another people’s law was the *Constitution of 1997*, as the process of drafting included public hearings. It was the people’s law, but it was not the politicians’ or bureaucrats’ law. Because the *Constitution* was intended to restrain politicians, it created too many responsibilities for bureaucrats, and it did not follow the culture of politics in Thailand. However, I believe that if there had been no coup in 2006 and the “people’s constitution” had remained in force, Thai politics would have developed its culture to fit with the *Constitution*. Unfortunately, the “people’s constitution” has gone. Although the *Constitution of 2007* is not much different in substance from the *Constitution of 1997*, the process of drafting, and therefore its legitimacy, is different.

When the people cannot make law by using Parliament, they make their own laws in their communities, as described in the concept of the law of the commons.

One explanation from the context of law making is that Thai law, normally, has owners and the owners of the law will be its users and enforcers. This is Thai legal culture “rule number one”.

¹²⁶ Panyarachun had connections with the UNEP. Compare this with Shinawat, who said “the UN is not my father” when the UN warned him about the war on drugs which caused the death of many accused of drug-related offences.

6.2.2.2 Legal Education

In law school, I found that legal culture is created through legal education in two major ways. The first one is the teaching method and the second one is the curriculum and subjects taught in law school.

The first teaching method, in regular law school and also in professional institutes such as the Barrister's Council that provides training for lawyers before they take the bar exam, creates fundamentally normative lawyers. Fundamentally normative lawyers are lawyers who apply the law based on legal theories that come from fundamental law. "Fundamental law" refers to the code law, which includes the *Penal Code*, *Civil and Commercial Code*, *Criminal Procedure Code*, *Civil Procedure Code*, *Tax and Revenue Code*, and *Land Code*. These laws are based on solid legal theories and lawyers use court decisions to explain their enforcement; for example, lawyers use property law principles to analyze property law cases and interpret property law. Many law students want to be judges or public prosecutors, so they have to pass the bar exam. The bar exam is based on cases from the Supreme Court, so the better one can memorize the cases and use their patterns of answers, the greater the likelihood that one will pass the exam. Therefore, the Barrister's Council influences law schools to try to have as many of their students pass the bar exam as possible.

In the early days of legal education, law schools relied on legal institutions such as the judiciary and prominent professors. Law schools, as well as the Barrister's Council that provides training for the bar exam, invited Supreme Court justices to be adjunct professors. Hence, legal education is founded on the teaching methods of judges. In later years, legal education developed and law schools graduated more professors; however, sometimes law schools still invite judges to be adjunct professors because the judges' images make the school look prestigious and professional. Law school tends to be a professional training school rather than having a focus on academics or jurisprudence.

Tutors in law schools train law students to apply the law in very specific ways. When exams test legal knowledge, they normally require students to apply case law to fact scenarios, and the way to gain a high score is to apply three steps. First, law students have to analyze what kind of a case there is on the facts, then explain the law and legal principles of the case, and finally synthesize and answer whether the subject is guilty or liable.

Based on this teaching method, lawyers are trained to use fundamental law in certain ways in three steps: point out the issue in the case; apply the law; and then make a decision.

This is the process that we saw in the *Pati Ming* case in Chapter 4. The judge did not mention the *Constitution* because it was not relevant to the criminal case and it was not necessary to raise other issues because the court was already able to apply the law and make a decision that resolved the case. This stems from the accepted Thai legal practice of working from solid legal principles.

The second issue about legal education that shapes Thai legal culture is the curriculum in law school. The curriculum provides only courses that are based on the legislation that the law school thinks will help their students pass the bar exam. Other special courses will be free elective courses so that fourth-year students can pursue their specialties. Currently, it takes four years to finish an LL.B. in Thailand. There are three and a half years of mandatory courses that are based on the major law codes. Special laws will be provided when needed but statutes are the core of the law school curriculum. For example, there were no environmental law courses in the curriculum until 1992, when the *Environmental Protection Act* was enacted. After this, the law school created an environmental law course as a free elective course for fourth-year students. Therefore, the curriculum in law school mainly assists students to become legal professionals by helping them to pass the bar exam. Lawyers who wish to be civil rights activists will have to find their own ways to train themselves, such as by doing co-ops with human rights NGOs. There is very limited instruction on legal research because the fundamental subjects are already packed in the four years of the bachelor's degree. There is no room for teaching legal research to give law students tools for the future when they find unfamiliar legal problems. Hence, the curriculum does not reflect legal problems in society; thus, most lawyers do not sufficiently serve social needs.

When new laws are enacted that have never been taught in law school, the Law Society will provide training on such laws. For example, for corporate law, financial institutions could provide training programs for legal professions. Or, the Ministry of Justice could provide training programs for judges. However, there would have to be more pressure from the business sector before such economic and business law training could happen. In terms of human rights law, international organizations on human rights would have to support this kind of training. There is as yet no CFM support group that can get the attention of lawyers and judges. However, it was a small step toward the acknowledgement of indigenous people and environmental issues when the Ministry of Justice and the Environmental Branch in the Court of Justice provided a training program for judges. This step needs more support from legal

educators, such as academic research and commentary on CFM, in order to create a legal culture that is informed about environmental law and CFM.

There are many Thai academic works on CFM in the social sciences¹²⁷ and in environmental studies.¹²⁸ However, lawyers focus only on “legal issues” and rely only on legal commentaries.

For this reason, it is no surprise that lawyers do not apply CFM law, because they do not teach CFM in law school, as there is no legislation on this issue. Since the criminal law applies to CFM cases via forestry law if charges are about forest trespassing, lawyers will rarely apply the *Constitution*, which seems irrelevant to them; when the criminal law fits the case, it is enough. Lawyers do not think they need to raise issues about community rights in the *Constitution*.

6.2.2.3 Legal Institutions

When the modern legal system was first founded in Thailand, King Rama V had the idea to unite the legal procedure and judges in one judicial system – the Court of Justice. However, the King also founded the Council of State, adapted from the French *Conseil d'État*, as legal advisor for the administration, in addition to the Office of the Attorney General. The Thai judiciary had one system for general law, following the British concept that everyone goes to the same court, regardless of privilege or status. Many senior judges graduated from law school in England, following in the steps of Prince Rapi as the founding father of Thai law.

The Council of State served as legal advisor to the government on administrative legal issues, and also drafted the bills that the government brought before the Parliament. Later, the Council of State had its committee review petitions on administrative action and made recommendations to the government on particular cases. Many of the legal staff members at the Council of State graduated in France, and eventually developed the concept of public law cooperating with administrative law. An influential law professor who played an important role in this government entity was Amorn Jantarasomboon, former director of the Council of State and adjunct law professor. He actively initiated the idea of separation of the judiciary into two courts: the Court of Justice and the Administrative Court. This idea was opposed by judges and

¹²⁷ Ramitanon, Ganjanapan & Ganjanapan, *supra* note 62.

¹²⁸ Somsak Sukwong, *Community Forest Management: For Humans and Forests* (in Thai) (Bangkok: Sarakhadee, 2007).

the Barrister's Council. There was a long debate until the political reform in 1995, when Bowarnsak Uwanno, who is a law professor who graduated in France and was connected to Jantarasomboon, became one of the researchers for a constitutional reform project. Later, this idea was embedded in the *Constitution* and led to the establishment of the Administrative Court in 1998.

The idea of separating law into public and private spheres was introduced in law school by French-educated professors such as Uwanno, which was a powerful statement in the Thai legal academy. The idea of separation of the courts and separation of public/private law became embedded in the Thai legal system. In addition, the legal culture on fundamental law categorized the law into criminal law, private law, administrative law, and constitutional law categories. Each type of law has its own legal methods and procedures and these are not to be mixed. This scheme of classification ensures that the criminal law, private law, and administrative law each have their own branches within the court. Also, there are more specialized areas of law, such as labour law, family law, and intellectual property law, according to the branch of the court of the first instance. The one that is left out of this scheme is the constitutional law. This is because the channel to access the Constitutional Court is narrow. Although the *Constitution* has been amended so that people can claim their constitutional rights directly in the Court of Justice, it still uncommon to use the *Constitution*.

Normally, the *Constitution* is pled in the Constitutional Court in political matters, such as in cases about dissolving a political party or impeaching the Prime Minister. Access to the Constitutional Court by ordinary people has to be approved through a constitutional organization such as the Ombudsman or the Human Rights Committee.

From the CFM cases, we can see that the judges applied the forestry law as in a criminal case and ignored community rights under the *Constitution*. In Thai legal culture, the criminal law trumps the *Constitution*.

6.2.2.4 Textbooks and Commentaries: Objectives of Law

Basic principles that guide law enforcement and constitute sources of law come from textbooks and commentaries by prominent law professors. In the past, law schools invited the Supreme Court justices to teach in law schools, and these justices also wrote legal textbooks. In 1930s, there were few law schools. The first was created by the Ministry of Justice. Law schools were then opened in universities such as Chulalongkorn University and Thammasart University.

Because of the small number of law professors, professors who taught courses in school also wrote the textbooks, and these textbooks became major reference sources. The author of a textbook became master of that subject, and what he or she said became the law and influenced court decisions and law enforcement.

For example, original commentaries that have been influential in the Thai legal system concerning CFM issues include commentaries about property law, land law, constitutional law, and public law. Property law was taught by Praya Thepwitton, who was also one of the members of the drafting committee for the *Civil and Commercial Code*. The second generation of property law commentaries was written by Seni Pramroj, educated at England's Gray's Inn. U.S. constitutional law was taught by Pairoj Chaiyanam, Yud Sangutai and later by Visanu Khraungam; and public law based on French and German public law concepts was taught by Pridi Phanomyong and Prayoon Ganjanadul who both graduated in France. The new generation of public law scholars includes Worapoj Wisarupit, and Bowarnsak Uwanno.

British concepts dominate property law, while land law is based on Thai legal culture, due to the land use and land registry practice. British concepts also govern the general law in the *Civil and Commercial Code*, as do the positivist explanations by Thanin Krivixian and Yud Sangutai on the basic principles and rule of law. Thai law was given a positivist definition by Prince Rapi, the first and most prominent modern Thai law professor.

Regarding the *Land Code*, the textbooks explain the process of registering land titles; this process permits the state to collect tax on private property. The law classifies land into two main categories: public and private land. One of the reasons for this division is that only private land can be subject to ownership. As a result, the *Land Code* has become a pillar of Thai land law. Section 2 provides, "Land that no one owns becomes public land." The concept of Crown land has become a fundamental principle that governs other laws such as forestry law. This is an example of the influence of commentaries and textbooks on the legal culture. The old prominent commentaries and textbooks still continue to dominate legal implementation.

The commentaries and textbooks on public law can be divided into two groups. In the constitutional law arena, the early textbooks were written by Pairoj Chaiyanam and Yud Sangutai, and later by Visanu Khraungam, based on British and U.S. concepts. These works did not explain the law in detail; they just mentioned the principles and classified the types of constitutional issues. Further, Thailand amended the constitution so frequently that it became almost pointless to learn all the sections, unlike for the code laws. As well, the teaching

methods in constitutional law are different from the teaching methods used for other fundamental areas of law. This leads to a legal culture that treats the constitution as a state policy, and not as real, enforceable law. After the proclamation of the *Constitution of 1997*, the Barrister's Council began to teach constitutional and administrative law as a fundamental part of the training program, using cases to interpret the law. This might be a good new way to create a culture of familiarity with the *Constitution* that would lead to real enforcement of constitutional law in the courts. However, this also turns constitutional law into a subject of professional practice, not a principle of jurisprudential education.

The influence of the old prominent commentaries and textbooks about legal implementation reflects the Thai legal culture that creates law enforcement. However, this situation has changed now because law schools have opened in most universities with the booming of judicial job possibilities after the Administrative Court separated from the Court of Justice, and also with many of the constitutional organizations. Law school is the third most common professional program in universities, after medical school and engineering. Law professors are more common and not as highly respected as in the past. Also, their commentaries have been contested, and some are not particularly academic or based on the doctrine of jurisprudence. Lately, commentaries and textbooks have not had enough power to sway the judiciary. However, the commentaries of members of the Barrister's Council, which has Supreme Court justices as teachers in their training program, may still dominate as guidelines for the courts.

6.2.2.5 Case Law

I mentioned previously that Supreme Court decisions have been used as examples of legal interpretation in the legal education system as a fundamental teaching method. Even though the Thai legal system is a civil law system, court decisions reflect legal culture about how the law has been enforced. Therefore, I will use forestry law cases to find legal culture in court decisions. There are two kinds of cases referred to in this section. The first group is the group of forestry law cases from the Court of Justice. The other group is the group of cases from the Constitutional Court, which are examined to learn how the Constitutional Court applies the *Constitution*.

Based on the *Pati Ming* case,¹²⁹ I found that the courts in CFM cases did not apply the *Constitution* and did not explain why the *Constitution* was not relevant to the cases. In *Pati Ming*, the constitutional protection of the right to practise CFM was ignored, even though the defendant claimed that he complied with his village's CFM regulations and was granted permission by the CFM committee to use the timber products for household consumption. In that case, the defendant was charged with possession of lumber over the legal limit. The court sentenced him to eight months in prison but, because he had never been guilty of any wrongdoing before, the court suspended his sentence for two years, and he was put on probation. This case is known among civil rights activists as the "CFM case"; however, the only reference in the court decision to CFM was in the defendant's statement.

There is another case,¹³⁰ the *Pingkhong* case, in which the defendant claimed that he was practising CFM and following the regulations of the CFM committee before cutting a tree for household consumption. This decision is the same as in the *Pati Ming* case, with the defendant receiving a suspended sentence, but here the judge reasoned that the *Constitution* was dropped from the case because the defendant admitted to committing the acts described in the indictment. However, the defendant was only admitting that he cut the tree – because he thought he had the right to cut and use the tree. He was not admitting that he was guilty.

In the CFM cases that the villagers brought to the Court of Justice, the judges did not apply the *Constitution*, but only applied the forestry law as in a criminal case. However, these cases show that the standard penalty is a suspended prison sentence, probation for two years and a fine.

Based on my field research interviews with public prosecutors discussed in Chapter 5, section 5.2.2.2, civil suits claiming compensation for causing global warming have become effective law enforcement tools from the view of public prosecutors. This is because villagers are afraid of having to pay such compensation, as they do not have the money to pay such high amounts. The following case, known as the *Lumsak* case, provides an example of a judicial decision on global warming compensation. The defendant was arrested and charged with clearing land and trespassing in a wildlife sanctuary in May 2005. In April 2008, the Court of Appeal ruled that the defendant was guilty, and sentenced her to six months in prison, such sentence to be suspended, and two years' probation. The DNWP also filed a claim for civil

¹²⁹ Provincial Court, Chiang Mai (2001), 3860/2544.

¹³⁰ Provincial Court, Chiang Mai (2003), 1035/2546.

compensation on behalf of the state, alleging that the defendant caused global warming. The claim was filed pursuant to section 97 of the *Enhancement and Conservation of National Environmental Quality Act 1992*,¹³¹ and the Civil Court rendered its decision in December 2009.¹³² The defendant was liable to pay compensation of 27,654 baht (\$920 CAD) plus interest of 7.5 baht per year up to the date of judgment, which amounted to \$32,087.28 baht (\$1,060 CAD), for a total amount of 129,732.28 baht (\$4,304 CAD). The defendant argued that the boundaries of the land she lived on before the forest was gazetted as a forest area were unclear, while the Crown claimed that she was trespassing on more than the land she reported to the DNWP on the forest land dispute register. In this case, the plaintiff and the defendant argued about the reliability of the calculation that the plaintiff used. The defendant called two expert witnesses on forestry and ecology science, Somsak Sukwong and Pearmsak Makarabhirom, who argued that the calculation by the DNWP was exaggerated and no one could tell the exact amount of damage that had resulted from clearing the land.

The judge ruled that the Cabinet Resolution on suspending charges against people living in disputed forest areas was merely a government policy and could not erase the defendant's guilt. The expert witness claimed that the state's claim for compensation was not reasonable, but the experts did not lead evidence about the actual amount of the damages, so the judge decided compensation payable for overall damages would be 45,000 baht (\$1,500 CAD) plus interest. On the issue of the limitation period, the plaintiff filed after the expiry of the one-year period for civil cases but, as this case was related to a criminal case, the clock stopped running during the criminal proceedings. So the fact that it had been four years from the incident did not invalidate the civil action. However, because of the issue of limitations, the judge held that only the interest would be payable, which was not to exceed 32,075.28 baht (\$1,064 CAD).

Another case,¹³³ known as *Mae Sort*, is an example of a judge taking account of expert evidence and accepting the claim of the defendants that they had traditionally lived on and used the subject land. The facts of the case were that the defendants were clearing forest land.

¹³¹ *Enhancement and Conservation of National Environmental Quality Act 1992*, Royal Thai Government Gazette 109:37 (4 April 1992) [*Environmental Protection Act*]. Section 97 states, "Any person who commits an unlawful act or omission by whatever means resulting in the destruction, loss or damage to natural resources owned by the State or belonging to the public domain shall be liable to make compensation to the State representing the total value of natural resources so destroyed, lost or damaged by such an unlawful act or omission."

¹³² Provincial Court, Lumsak (2009), 789/2552.

¹³³ Provincial Court, Mae Sort (2010), 1737/2551.

The defendants admitted that they practised rotation cultivation in that area. At first, the court ruled that the defendants were guilty, and they were imprisoned the same day. The family found the defendants in jail and appealed the case. On appeal, the defendants' lawyers argued that the defendants did not understand the charges and the trial court had not provided a translator, which had resulted in an unfair trial. They demanded a re-trial. In this case, the defendants had the head of the District supporting their evidence that they had lived in that area before the PA was created. In addition, the defendants submitted the expert evidence of anthropologist Pinkaew Laungaramsri, who had conducted research on the Karen tradition of rotation cultivation. She confirmed that rotation cultivation was an original tradition of this tribe and that it was less damaging than replanting the forest. In this case, the appeal judge overturned the trial judge's ruling and acquitted the defendants.

Even though these two cases, *Lumsak* and *Mae Sort*, were not cases specifically about CFM, they demonstrate how the judges made their decisions and how they considered the evidence from expert witnesses, the kind of evidence that would probably be used in a CFM case.

Another set of cases to come from the Constitutional Court demonstrates how civil rights under the *Constitution* have been applied. The first case is about community rights under section 46 of the *Constitution*, the same section relevant to CFM, but this case was about the unlicensed production of local alcoholic spirits, which the villagers claimed was their tradition.¹³⁴ The case was appealed from the Lumphun Provincial Court to the Constitutional Court. The main issue in the case was whether section 5 of the *Spirits Act 1950* was contrary to or inconsistent with sections 46 and 50¹³⁵ of the *Constitution*. Section 5 of the *Spirits Act 1950* stated that the distillation of spirits or the possession of containers or instruments for the distillation of spirits must be licensed by the Director-General of the Excise Department. The distillation of spirits by the defendant was achieved using agricultural products through the application of local knowledge.

The Constitutional Court held that section 46 of the *Constitution of 1997* was intended to allow the community to administer or manage resources in its locality for its sole benefit, to manage the conservation and utilization of natural resources found in the community for mutual benefits and

¹³⁴ Constitutional Court of Thailand, Bangkok (4 November 2003), 6/2546.

¹³⁵ *Constitution of 1997*, *supra* note 16, s. 50: "A person shall enjoy the liberty of engaging in an enterprise or an occupation and to undertake fair and free competition."

customs, and that art or beneficial traditions of the community should be conserved by the community itself. Nevertheless, the exercise of such rights must be in accordance with the provisions of law (section 46, last paragraph), and at that moment there were no provisions of law on the rights of persons to assemble as local communities as stipulated by the *Constitution*. Thus, the provisions of the *Spirits Act 1950* which stated that the distillation of spirits or possession of containers or instruments for the distillation of spirits must be licensed by the Director-General of the Excise Department constituted an imposition of a legal duty that must be complied with by all persons. Therefore, section 5, paragraph 1 of the *Spirits Act 1950* was neither contrary to nor inconsistent with section 46 of the *Constitution*.¹³⁶

The result in this case has shown how the Thai legal professions interpret the constitutional phrase “as provided by law” which is normally found at the end of the sections on people’s rights, including at the end of section 46 of the *Constitution of 1997*.

The next case was a successful case on equal rights under section 30 of the *Constitution*. This case¹³⁷ came from the Ombudsman, who requested a Constitutional Court ruling under section 198 of the *Constitution* because section 12 of the *Names of Persons Act 1962* raised questions of constitutionality. At issue in this case was whether section 12 of the *Names of Persons Act 1962* made it mandatory for married women to use their husbands' surnames only. The Constitutional Court compared the two previous statutes: the *Surnames Act 1913* and the *Names of Persons Act 1941*, and found that both laws stated that women could “choose” whether to use their husbands’ surnames. Later, section 12 of the *Names of Persons Act 1962* stated that married women were “compelled” to use their husbands’ surnames, and this created inequality between men and women. Therefore, section 12 of the *Names of Persons Act 1962* was found to be unconstitutional by reason of being contrary to or inconsistent with section 30 of the *Constitution*. The provision was therefore unenforceable according to section 6 of the *Constitution*.

These two cases from the Constitutional Court illustrate the procedure by which constitutional cases are argued. Also, they show that the focus of the court decisions is very much on statutory interpretation; cases will be rejected if there is no statute that directly applies. Moreover, if there is already a statute that governs a case, the Constitutional Court will

¹³⁶ Constitutional Court of Thailand, Bangkok (4 November 2003) 6/2546. trans. by Asian Legal Information Institute, online: Asian Legal Information Institute <<http://www.asianlii.org/th/cases/THCC/2003/6.html>>

¹³⁷ Constitutional Court of Thailand, Bangkok (5 June 2003), 21/2546.

apply the statute, as it has to reason according to the law. Thus, the decision of the court on the distillation of spirits under the *Spirits Act 1950* can be analogized to cases about CFM, to which the forestry law also applies. When considering these principles, and the culture of the courts, it is most likely that a decision on CFM would be the same as in the distillation of spirits case – that is, the state forestry law would be found to be constitutional.

6.3 Results and Side Effects of Thai Legal Culture

By reviewing the history of the law and society and the contexts of the legal system, I believe I have found some answers as to why the Thai legal system is not compatible with CFM, and how this causes the law concerning CFM not to function.

6.3.1 Normative Approach in Law Enforcement

Lawyers are familiar with the normative approach. The law is explained by concrete legal principles and there are cases that provide precedents for lawyers to follow. This culture is rooted in the positivist beginnings of Thai legal education and is perpetuated in the legal institutes and the professional schools that dominate legal education in Thailand. The law that positivist lawyers are comfortable applying, such as the criminal law, needs to be clearly explained and to have obvious signposts to follow. Therefore, the living law like CFM is alienated from the legal culture and, to be safe, lawyers just apply the law that they are familiar with, such as forestry law. The *Constitution* also falls into the same category as CFM, because it is changing all the time. Until there are enough cases to judicially consider the *Constitution*, and enough legal literature to explain it, it will not be applied as law, only used as state propaganda.

This normative approach to law leads to differences in enforcement of law in the legal regime and in the real world. In the forest, CFM applies to the people who live and work there, including government officers. The gap between the “professional” law and the living law will only increase.

6.3.2 Common Law Legal Culture in the Civil Law System

From Prince Rapi to the Barrister’s Council, professional legal training is dominated by the case law concept. Although there is no formal system of precedent in Thailand, the fact is that the interpretation of the law is based on case law.

6.3.3 Unreal Hierarchy of Law

The supremacy of the *Constitution* is not applied in Thai legal culture. Following the concept of the “cultural constitution”, we need to look at the real actors and their functions in society. The real functional law in the Thai legal system is statutory law, which has its protectors. The obvious example is forestry law. The law is administered by government officers who have the power to exercise the law. The *Constitution* does not have a protector. The people cannot protect the *Constitution*, because the *Constitution* itself is not embedded in the Thai internal legal culture like the five major code laws and it does not have an “owner” like forestry law does. Moreover, rights under the *Constitution* do not have protectors either, because people’s legal mobilization has not yet been established in the internal legal culture. Therefore, it does not have real functionality. The drafters designed the *Constitution* to be implemented by constitutional organizations such as the Ombudsman, the Human Rights Committee, the Administrative Court, and the Constitutional Court. However, these organizations also enforce the law within the legal culture of a fundamentally normative approach, so they only apply the fundamental laws such as the criminal and civil law.

6.3.4 Fundamental Principles in Five Major Codes

Generally, for ordinary people, code law is the basic law. This has been a conventional form of law since the birth of Roman civilization, and was adopted by the Thai legal system. Now it dominates Thai legal culture. Its enforcement is very powerful in the professional legal system. For example, the Barrister’s Council and lawyers apply this law actively. These legal groups have the highest interest in law enforcement in the Thai legal system. For example, property law principles in the *Civil and Commercial Code* and in the *Land Code*, such as the non-transferability of public property, have been incorporated into other statutes. This principle is contained in every statute about state property.

6.3.5 Making the Law: Owners of the Law

A consultative process of drafting the law should be part of successful law enforcement. This happened when the people’s law petition was submitted to the Parliament and passed as law. There is always an authority that enforces a statute and this creates a sense of ownership in the minister who is in charge and has direct power in that area, i.e. the forest. In creating a statute, a government agency proposes a reason to have a law, and then presents a draft bill to

the Parliament. When a bill becomes law, the relevant government agency will enforce that law effectively and, when the law needs to adjust to changing situations, the government agency will amend the law by submitting it to Parliament. This mechanism works well in the cycle of create – use – adjust – use. The people's draft *Community Forest Bill* did not fit with this cycle. When the people owned the draft *Bill*, the other owner of the *Bill* was the RFD, so the people did not have support from an agency inside the government or in the Parliament. This was the reason that the *Community Forest Bill* failed to serve as the people's draft.

6.3.6 State Monopoly over Common Property: Public Trust Doctrine

The forest and the land have always belonged to the state since ancient times, because the laws were written by the rulers. However, the explanations for the concept of Crown land may differ. For example, does "Crown land" relate to the concept of the king ruling his kingdom as a demi-god, or to the public trust doctrine from Western law? When we look at the history of law enforcement, if the state enforces the law too strictly, the people might leave or violence might erupt in the community. In fact, the strength or weakness of state law also depends on the community or on the people as a whole. In the old days, when the state's power was weak, the community could access their natural resources more easily than in the present day. The situation cannot revert to the way it was in ancient times, because the land and the forest are now limited relative to the population. Thus, communities have to adapt themselves to the concept of Crown land.

When the community is in the right, the state cannot exercise unjust power for long. For example, with the Khor Jor Kor project, the government tried to relocate the people, using military force to burn the villagers' homes. When the pictures were made public, the project was faced with massive resistance. Means and ends, both, should have been exercised in the proper way. In terms of CFM, the means are participation, and the ends are forest conservation and the people's survival.

6.3.7 Separated Law

Since the boom in public laws proclaimed by the Council of State, or *Krisadeka*, the Thai legal system has been separated into public law and private law areas. Cases that come to the courts have to follow this classification. Criminal law is still strongly enforced, and this means that constitutional cases are excluded from the Court of Justice.

6.3.8 No Room for Customary Law

There are not many cases that consider the enforcement of customary law. Customary law is only used to fill gaps in state law. This is the interpretation of section 4 of the *Civil and Commercial Code*, which is a law of general application. Hence, CFM cannot be applied as customary law because there is written law already in force, and that is the forestry law. This is the reason that I do not want to refer to the villagers' practice of CFM as "customary", because this characterization will be considered invalid when it comes to forest law disputes. I prefer to say that CFM is "living law", by which I can deny the state's methods of law enforcement and can promote CFM's real legal function in society.

6.3.9 Individualism from Modernized Law

As society changed over time – from ancient times until the era of the modern state – the notion of community disappeared from the law. For instance, the law of Lanna contained a concept of communal land, but when the law changed and adopted the law of the central part of the country, centralization and state power extension in rural areas occurred. Natural resource lands were turned into commodities. State intervention destroyed the community function, because people no longer needed the community to practise subsistence livelihoods.

6.3.10 Imperialism by Central Administration

The central government took away natural resources from local people and used them as a source of government income. Forestry law and the RFD became tools of the government to manage natural resources. The *Land Code* is also a tool of the government to collect tax, which has become the income of the central government. It was not until recently that the local administrative organizations were allowed to take some share of the tax.

6.3.11 Unity of Law Comes First

As a result of history, the country's reforms at the time of King Rama V were based on the belief that unity of law and legal institutions would prevent the country from being colonized and would help to build the modern nation state. Thus, the concept of universal law remains the ideology of the Thai legal system. Hence, flexible law enforcement depending on the character of the community is still far from reality.

6.3.12 No Rebellion in Court

Although Thai judges are aware of CFM, they still do not accept CFM as legitimate. Even though there is a cabinet resolution accepted by government officers and applied by them as administrative law, the judges will rule against CFM rights, or ignore them altogether. The judges accept that the real world and the world of the court are different worlds, as if the courtroom is more sacred than the spiritual forest.

6.3.13 Folk Law is Deemed Invalid

Regarding the regulation of CFM, the culture of strong state law enforcement denies the folk law of the villagers. The reason that the lawyers do not use CFM regulations is that they conflict with state forestry statutes. CFM regulations have not reached the status of folk law because they have not been practised long enough in CFM communities. That is, folk law is more than just a collection of regulations. In addition, the regulations are the written form of laws that come from a synthesis of rules originated by hill tribes – such as the Karen tradition of classifying the forest into three types: the sacred or spiritual forest, the conservation forest, and the utilized forest – merged with NGOs' ideas of sustainable forest conservation and management.

6.4 Chapter Conclusion

In order to present a comprehensive picture of the Thai legal system, I have reviewed the history of Thai law from ancient times until the present day. Communities have changed from collective units practising a subsistence livelihood to communities in rural areas subject to governmental development projects. The land and forest have changed from being viewed as communal resources to being seen as commodities. The law has changed from being social security-focused to being merchandise-oriented. Legal procedures have changed from ways of simply trying to solve conflicts into professional techniques that only formally educated people can use. In the legal context, the process of law making depends on politics; thus, people have to wait for opportunities to propose changes to the law. Legal education is the major force that shapes legal culture, as an unseen influence that controls the enforcement of the written law. Commentaries and textbooks influence the legal culture to be mainly formalist and positivist. Case law is a reflection of mainstream thinking that dominates law implementation, and the

trend is towards a professionalist approach that trains lawyers to become professionals, rather than scholars of jurisprudence. Hence, it will be difficult for alternative legal issues like CFM to be discussed in the legal mainstream and, thus, for CFM to achieve the objective of enforcement.

CHAPTER 7 CONCLUSION

As I stated in my introduction, my hypothesis in this study has been that Thai legal culture is not compatible with CFM. To test this hypothesis, I used two approaches in conducting my research. The first one was to discover the legal consciousness of the people involved in CFM implementation. To do this, I interviewed three groups of people: villagers who practise CFM; government officers who have direct authority over the forest; and members of the legal profession who employ and interpret the law concerning forest conservation. I interviewed villagers from three communities in northern Thailand known for their connection to CFM. It is important to clarify again that these three selected communities are not typical Thai CFM communities and thus cannot be generalized. Because every community is unique and has its own story that shapes its legal consciousness, I suggest the Thai legal system applies legal pluralism. My aim in choosing these three communities was to illustrate how ordinary people interact with the law from their perspectives, providing a micro view of the external legal culture, prior to showing the macro view from the internal legal culture of legal professionals.

My second approach was to find internal legal culture in the Thai legal system. I investigated the history of the social movements that developed legal practice in Thailand and influenced legal culture. At the same time, from a different angle, I tried to find – from inside the legal system – what shaped the legal culture's behaviour. By looking at lawmaking, legal education, textbooks and commentaries, legal institutes, and court cases, I was able to draw a picture of the legal culture that affects CFM implementation.

Based on these two approaches to legal consciousness and legal culture, I found that two pictures had emerged. The first picture was of people's personal experiences and their responses to the law. The other was a holistic, systemic picture of the legal function. It is important to consider both micro and macro images, first looking at individuals' thoughts and then looking at the surrounding contexts and the environments that shape individuals' reactions.

In terms of the legal consciousness of the people, personal and communal beliefs are important for legal implementation. Law enforcement has to come from inside, not just be controlled externally. The reason that regulation of CFM can be enforced efficiently by villagers is because they know that observing CFM regulations is in their best interests and in the best interests of their communities. Communities also use traditional beliefs, such as belief in forest

spirits, as tools to implement the law of the commons. According to natural law theory, the belief in good and evil is a basic consciousness that leads to the rule of law. Similarly, the belief in goodness legitimates and validates the villagers' CFM regulations. CFM operates on the fundamental principle that the villagers are stewards of the commons. Thus, people who want to make CFM acceptable have to demonstrate the value of their "good" practices to the public, because people who do not live in the forest and future generations are also affected by degradation of the ecosystem.

In looking at the practice of CFM and examining its results on people's livelihoods and the environment, I have illustrated the attitudes of villagers, government officers and lawyers towards the implementation of law concerning CFM. However, one concern I have about investigating legal consciousness is the problem of false consciousness. Sometimes, what people say is not what they really believe or do in real life. Discovering people's "real" intentions and actions is beyond the scope of this research, because such an investigation would require more time and possibly research tools from other disciplines, such as ecology. Perhaps my concern could be a subject for future research.

Geography plays a role in law enforcement. Because of their geographical distance from the centre of Thai government, villages in the forest are removed from state legal knowledge and law enforcement, and create their own regulations. Although, in some areas, the government can control communities from a distance, and can apply the concept of decentralization, for hill tribe peoples in the forest the most effective law is the law that fits with their ways of life. As a result, villagers draft their own CFM regulations and apply them within their communities. The communities in this study are considered to be moderately accessible. The communities were remote in that National Park officers would only patrol occasionally, and were certainly remote compared to modern cities, where legal institutions such as police can reach easily. However, there are some communities that are located in far less accessible areas, such as communities whose roads are cut off in the rainy season.

In sum, I found four key resources in the selected communities that assisted them in practising their CFM and reinforcing their CFM regulations. The first resource was a progressive leader who supported CFM. The second was the belief in nature as the spirit of life and the need to maintain religious beliefs in order to enforce the CFM regulations. The third was cooperation from scholars, NGOs, and government officers to assist the villagers with outside pressures such as changing government policies that affect forest management. The fourth

resource for CFM communities was knowledge: knowledge of GPS technology that allowed them to make CFM maps that could help them to prevent forest trespassing; legal knowledge such as knowledge about their constitutional rights; and knowledge about ecosystems that enhanced their traditions of respecting nature. However, the communities also faced several challenges to maintaining their CFM. Changes in society have affected the communities and have swayed the new generation away from their traditional beliefs. Capitalism and modern lifestyles have caused a weakening of communities' bonds and of their shared values about spirituality and nature. The villagers are aware of these threats and are trying to cope with them.

When I put the people's legal consciousness and Thai legal culture together, I see a double cultural law developing with respect to law enforcement. One branch is the living law that is actually applied in society, and the other is the "professional" law as taught in law schools and professional institutes. Villagers use both the law of the commons and state law as tools to promote their own survival; together, these two kinds of law make up the living law of the people. The other branch is the "professional" law. Lawyers use particular terms, set standards for legal mechanisms and associate with their fellow professionals. From my research, I believe that a new Thai legal culture can be created, even though it may take time. The solution to protecting CFM is to create a professional legal culture that responds to social needs better than the one Thailand has now.

The Thai legal system has two important characteristics that cause it to be incompatible with CFM. One characteristic is the fundamentalism of the code law. Thailand adopted legal principles on land and natural resource management from India, and from Western countries, mixing the Romano-Germanic system with the common law culture, as illustrated by the prominent law professors who use case analysis as a method of interpretation and instruction to produce legal professionals. Although this practice is part of mainstream legal education, alternative forms of legal study, such as socio-legal study, have begun to find their way into the Thai legal system. Attempts at creating an alternative form of legal study provide new hope that legal education can eventually create lawyers who are more responsive to social needs and who could, for example, use legal pluralism and indigenous legal concepts when working on CFM cases.

The second characteristic preventing compatibility between CFM and the legal system is the separation of the branches of law and, thus, of the courts. Enforcing the law according to

its objectives seems promising. However, this has caused legal malfunctions in society. In practice, one case may have to be heard in three different courts, one after the other, before a resolution can be arrived at. I do not suggest merging all kinds of law together – criminal law, civil law, legal procedure, public law, constitutional law, etc. At this stage, I only know that the legal profession in Thailand is handling this issue wrongly. My suggestion for improving CFM law enforcement is to apply section 66 of the *Constitution of 2007* directly. The written law in the *Constitution* is ready to apply, but lawyers do not want to use it because their legal culture says that statute law trumps constitutional law. The custom in Thai legal practice is to mainly use statutes such as the *Civil and Commercial Code* and the *Penal Code*, as well as other black letter law that directly empowers government officers, such as forestry law. To change legal culture, the CFM movement needs to launch a revolutionary constitutional case like the *Names of Persons* case. However, for society to respond positively, there needs to be preparation of the social structure, for example through legal education, to support the concept of the commons in the Thai legal system.

The hierarchy of laws is not a problem. Even if the *Constitution* were never applied as the supreme law of the land in Thailand – of course, it should be – merely helping it to function better could improve CFM implementation. The concept of the cultural constitution fits with Thai legal culture. We need to look at the actors in society and how they exercise their power and relate to other actors. In the CFM arena, the actors are the villagers, the government officers, the environmentalists, and business people. The lawyers do not actually play in this game. They are just functionaries. What moves the actors on the stage is the “invisible hand”: the interests and beliefs of the actors.

It is necessary to consider community rights practices with regard to community forests and the causes of the struggle for implementation of these rights. A better understanding of Thai legal culture will lead to better protection and enforcement of CFM rights under the Thai *Constitution*.

This study has illustrated that Thai legal culture is not compatible with CFM. It has shown the clash between state law and living law, revealing that people involved in CFM have two sets of laws that they apply and enforce. The living law, or external law – the law that ordinary people use in their CFM practice – is a combination of their own CFM regulations and state law, which they resort to when violation of the regulation of the commons goes beyond their control. Those inside the legal profession apply state law and ignore the law of the commons,

which often leads to social disruption. My suggestion for improving the understanding and application of CFM in Thai legal culture is to apply the concept of the commons to CFM. This will help to maintain forest stewardship and conservation where communities are ready to balance their rights to self-determination with the needs of nature.

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- Interview with Pattrra, judge in Chiang Mai Provincial Court (9 November 2010).
- Interview with Wanchai, judge in the Supreme Court, Bangkok (16 November 2010).
- Interview with Sutee, judge in the Supreme Court, Bangkok (16 November 2010).