

## Constitutional Court Ruling

No. 14/2563 (2020)

Dated 9<sup>th</sup> September B.E. 2563 (2020)

Between	{	Narathiwat Provincial Court	Applicant
		-	Respondent

**Re: Whether or not section 151 paragraph four of the Emergency Decree on Fisheries B.E. 2558 (2015) was contrary to or inconsistent with section 4, section 26, section 29 and section 40 of the Constitution.**

Narathiwat Provincial Court referred the objection of a defendant (Mr. Dean Mudlae) requesting for a Constitutional Court ruling under section 212 of the Constitution. The facts could be summarized as follows. Narathiwat Provincial Public Prosecutor prosecuted the defendant on a charge of owning a legally registered fishing vessel having a size of one hundred and fifty gross tonnage or higher and operating a commercial fishing activity therewith without installing a vessel monitoring system and maintaining the operability of such system at all times as required under section 81(1) of the Emergency Decree on Fisheries B.E. 2558 (2015), as amended by the Emergency Decree on Fisheries (No. 2) B.E. 2560 (2017). The defendant objected that section 151 paragraph four of the Emergency Decree on Fisheries B.E. 2558 (2015), which prescribed a fine of four million baht for an offence under section 81(1) was an unreasonable and disproportionate penalty and did not give the court a discretion to lower the fine to an appropriate amount. Furthermore, such penalty was significantly higher than section 151 paragraph one, paragraph two and paragraph three. The provision was therefore a restriction of rights or liberties of the people beyond necessity, disproportionately increased a burden and restricted a person's right or liberty to engage in an occupation, being contrary to or inconsistent with section 4, section 26, section 29 and section 40 of the Constitution. The Constitutional Court accepted this case for consideration. In the interest of the proceedings, the court directed the Director-General of the Department of Fisheries and Secretary-General of the Council of State to give a statement and submit information.

The Constitutional Court considered the defendant's objection, statement of relevant agencies and supporting documents and determined that the issues

requiring decision were whether or not section 151 paragraph four of the Emergency Decree on Fisheries B.E. 2558 (2015) was contrary to or inconsistent with section 4, section 26, section 29 and section 40 of the Constitution.

After deliberations, the Constitutional Court found that section 4 of the Constitution was a provision in Chapter 1 General Provisions. Paragraph one provided that “human dignity, rights, liberties and equality of persons are protected.” Paragraph two provided that “Thai people enjoy equal protection under the Constitution.”

Section 26 was a provision in Chapter 3 Rights and Liberties of the Thai People. Paragraph one provided that “the enactment of a law which results in the restriction of a right or liberty of a person must meet the conditions prescribed by the Constitution. In the case where the Constitution did not prescribe a condition, such law must not be inconsistent with the rule of law, not increase the burden or disproportionately restrict a right or liberty of a person, and must not prejudice the human dignity of a person. The law must also specify the reasons of necessity for the restriction of rights and liberties.” Paragraph two provided that “a law under paragraph one must apply generally and not be specifically targeted to any particular case or person.”

Section 29 was a provision in Chapter 3 Rights and Liberties of the Thai People. Paragraph one provided that “a person is not liable to a criminal penalty, except where an act committed constitutes an offence under a law in force at the time of the commission and for which a penalty has been prescribed, and the penalty to be imposed on such person cannot be heavier than the penalty prescribed by law in force at the time of commission of the offence.” Paragraph two provided that “in a criminal case, a suspect or defendant shall be presumed innocent and prior to a final judgment convicting a person for an offence, such person cannot be treated as an offender.” Paragraph three provided that “Custody or detention of a suspect or defendant can only be enforced where necessary for the prevention of flight.” Paragraph four provided that “in a criminal case, a person may not be forced to make a self-incriminatory statement.” And paragraph five provided that “an application for bail of a suspect or defendant in a criminal case must be considered and bail cannot be unreasonably excessive for the case. Denial of bail must be as provided by law.”

Section 40 was a provision in Chapter 3 Rights and Liberties of the Thai People. Paragraph one provided that “a person has the liberty to engage in an occupation.” Paragraph two provided that “a restriction of liberty under paragraph one is not permitted, except by virtue of a provision of law enacted for the purpose of maintaining national security or economy, fair competition, prevention or elimination of a barrier or monopoly, consumer protection, regulation of a profession

to the extent of necessity or other public benefit.” And paragraph three provided that “the enactment of a law to regulate a profession under paragraph two must not be discriminatory or an interference with the provision of education by an educational institution.”

The Emergency Decree on Fisheries B.E. 2558 (2015) was a law enacted for the following reasons. The Fisheries Act B.E. 2558 (2015) lacked measures for monitoring, control and surveillance of fishing operations in Thai waters and outside of Thai waters to prevent the commission of illegal fishing. The said law also lacked measures for the management of fishing in line with the natural maximum sustainable yield. Failure to tackle this problem in an expeditious manner could have an impact on Thailand’s fisheries. Therefore, the Emergency Decree was necessary in order to add measures for control, surveillance, search and inspection of fishing, so as to prevent, deter and eliminate unlawful fishing in line with international standards, and to provide guidelines for the conservation and management of fisheries and natural aquatic resources to enable sustainable exploitation. As for the Emergency Decree on Fisheries (No. 2) B.E. 2560 (2017), the law was enacted for the following reasons. The Emergency Decree on Fisheries B.E. 2558 (2015) contained certain provisions which were inconsistent with artisanal and commercial fishing operations, the prescription of rules governing the control and surveillance of fishing and aquatic animal transshipment activities, import of catch and notice of docking of non-Thai fishing vessel, which were insufficient for the prevention of unlawful fishing, along with insufficient measures for conservation and management of resources, actions against fishing vessels, fishing gear and aquatic animals or aquatic animal products that were used, in possession or obtained from an unlawful fishing activity. It was therefore expedient to revise such laws, resulting in the restriction of rights and liberties of persons for the benefit of conserving and managing aquatic living resources to an appropriate level and enable sustainable fishing, as well as to revise penalties for greater suitability. It was necessary to impose criminal fines for the prevention, suppression and deterrence of wrongdoings due to the seriousness of the infringements affecting the security of aquatic living resources and compliance with international obligations.

From the reasons for enacting the laws and statements of relevant persons, it was found that Thailand had a need to reform its management of aquatic living resources and fisheries in line with international standards under the United Nations Convention on Law of the Sea 1982, as ratified, as well as to act upon the formal warning issued by the European Commission. Therefore, in order to prevent impact on fisheries and the maintenance of national economic security, the law on fisheries was revised with regard to management of fishing activities, arrangement of monitoring, inspection, control and surveillance system for fishing in Thai and

overseas waters, and to prescribe a guideline for conservation and management of fishing and aquatic living resources for sustainable exploitation. This was achieved by prescribing standards for control, surveillance, search and inspection of fisheries, leading to the prevention, deterrence and elimination of unlawful fishing. Penalties, in particular criminal penalties, were also revised as suitable and proportional to the offence.

Section 81(1) of the Emergency Decree on Fisheries B.E. 2558 (2015) provided that “the owner of a vessel registered under the law on Thai vessels under the category of fishing activities and having the size prescribed by notification of the Minister must undertake the following: (1) install a vessel monitoring system and maintain the operability of such system at all times in accordance with rules and procedures prescribed by the Director-General.” The requirement for installation of vessel monitoring system and maintaining the operability of such system at all times was set due to the importance of such device in monitoring the position of vessels, inspecting the navigation routes of vessels, position and period of stationary vessels, so as to observe fishing behavior and compliance with the area and condition of licenses. The installation of a vessel monitoring system, however, meant that a vessel owner incurred additional costs. The law therefore empowered the Minister of Agriculture and Cooperatives to issue a notification to prescribe the size of fishing vessel required to install a vessel monitoring system. In this regard, the Notification of the Ministry of Agriculture and Cooperatives provided that a fishing vessel having a size of thirty gross tonnage or greater had to install a vessel monitoring system since a fishing vessel having a size of thirty gross tonnage or above had a greater fishing capacity than a vessel smaller than thirty gross tonnage. If a vessel owner failed to comply with section 81, the provisions of section 114(3) deemed such fishing activity as a serious infringement of the law. Furthermore, the law provided a penalty for a person who violated section 81 in section 151 paragraph one, which provided that “a person who violates section 81(1) or (4) or section 88(1) or (7) must be liable to a fine of twenty thousand baht.” Paragraph two provided that “if a person who commits an offence under paragraph one uses a vessel from twenty gross tonnage but not exceeding sixty gross tonnage, such person shall be liable to a fine of two hundred thousand baht.” Paragraph three provided that “if the person who commits an offence under paragraph one uses a vessel from sixty gross tonnage but not exceeding one hundred and fifty gross tonnage, such person shall be liable to a fine of one million baht.” And paragraph four provided that “if the person who commits an offence under paragraph one uses a vessel from one hundred and fifty gross tonnage or greater, such person shall be liable to a fine of four million baht.”

It was discernible that section 81(1) and section 151 paragraph four of the Emergency Decree on Fisheries B.E. 2558 (2015) was one of several measures for

preventing, deterring and eliminating unlawful fishing activities. The provision required that the owner of a fishing vessel registered under the law on Thai vessels to install a vessel monitoring system and to maintain the operability of such system at all times. A fishing vessel owner who committed an offence using a vessel of a size one hundred and fifty gross tonnage or greater was liable to a fine of four million baht. Such measure took into account of the severity of the offence pursuant to the vessel size and the benefits gained by the offender and prescribed only a fine to penalize the offender in accordance with crime policies directed at penalizing the assets obtained from the infringement instead of imprisonment. The prescription of fine and rate of fine under section 151 of the Emergency Decree on Fisheries B.E. 2558 (2015) was intended to achieve an effective enforcement of the law and prevent infringements in order to realize the legal intent of having a measure for monitoring, inspection, control and surveillance of fishing activities to prevent, suppress and deter offenders. Damage to aquatic living resources and benefits gained by the offender were taken into account in order to take away the incentive for committing an infringement since an offender would not be able to benefit from the actions. The fine level was set in proportion to the size of vessel, which took into account the fishing capacity, i.e. a larger vessel would have a greater fishing capacity in terms of vessel size, fishing gear size and type, engine size and number of fishing workers for catching aquatic animals that would exceed that of small vessels. The fine level was proportional to the size of vessel used for commission of offence. An offender who used a vessel from one hundred and fifty gross tonnage or greater would be liable to a fine of four million baht pursuant to section 151 paragraph four. Even though such fine level was high and was stated as a single fine without a minimum or maximum level, it was consistent with the principle of proportionality of penalty in accordance with the vessel size, which was in line with the value of catch obtained from the commission of offence. Furthermore, the court had a discretion to reduce such penalty where there was a cause under section 78 of the Penal Code, as appropriate to a particular case. Hence, the prescription of such fine was therefore proportional to the seriousness of the infringement and benefits obtained by the offender. Despite such provision restricting certain liberties of a person to engage in an occupation, such restriction of liberty had the purpose of preserving the security of aquatic living resources, being a component of national economic security. The restriction was in accordance with the conditions set forth under section 40 paragraph two of the Constitution. The provision was therefore not inconsistent with the rule of law, nor did it increase the burden or restricted a right or liberty of a person, specifically the liberty to engage in an occupation, disproportionately to the cause. The law applied generally and did not target a specific case or person. Furthermore, the law did not affect human

dignity or the equality of persons, and did not impose a penalty to a person at a level which was severer than as provided by the law in force at the time of the offence.

By virtue of the aforesaid reasons, the Constitutional Court held that section 151 paragraph four of the Emergency Decree on Fisheries B.E. 2558 (2015) was neither contrary to nor inconsistent with section 4, section 26, section 29 and section 40 of the Constitution.

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