

Summary of the Constitutional Court Ruling No. 24/2545

Dated 4th June B.E. 2545 (2002)*

Re : Are section 7, section 8, section 16(3), section 23, section 25, section 27, section 30 bis, section 30 ter and section 30 quarter of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997), as amended by section 4 of the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998), contrary to or inconsistent with section 4, section 26, section 27, section 29, section 30, section 48 and section 50 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)?

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1. Background and summarized facts

The Min Buri Provincial Court submitted the application of the defendant in Civil Case No. 488/2543 requesting that the Constitutional Court make a ruling under section 264 of the Constitution on whether or not section 7, section 8, section 16(3), section 23, section 25, section 27, section 30 bis, section 30 ter and section 30 quarter of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997), as amended by section 4 of the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998), were contrary to or inconsistent with section 4, section 26, section 27, section 29, section 30, section 48 and section 50 of the Constitution.

The facts as stated in the application and the attachments thereto were as follows. The Asia Recovery 1 Fund was a plaintiff in a lawsuit, Civil Case No. 488/2543, against the defendant, Safari World Public Limited Company, involving allegations of wrongdoings under contracts of monetary loan, sale and assignment of claim rights. In brief, the defendant borrowed a sum of money from Nakhornluang Credit Securities Public Limited Company and received the entire loan amount at the date of loan contract. Subsequently, the Ministry of Finance issued an order suspending the operation of businesses in Nakhornluang Credit Securities Public Limited Company. By the powers vested in it under the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997), the Committee of the Organization for the Reform of the Financial Institution System took over the control of the operations and proceeded to sell the assets of the securities company in order to settle its accounts. The Organization for the Reform of the Financial Institution System (ORFIS) sold

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to the plaintiff the various credits, loan instruments, claim rights, instruments and other documents related to the loan granted by Nakhornluang Credit Securities Public Limited Company to the defendant. As a result, the plaintiff was assigned with all the rights and duties of the original creditor. The plaintiff issued a letter of notification to the defendant demanding repayment of debts to the plaintiff. The defendant did not respond. Hence the plaintiff filed a lawsuit in this action.

The defendant filed a motion with the Min Buri Provincial Court which could be briefly stated as follows. The essence of one of the points in the defendant's submitted pleadings was that the Ministry of Finance had unlawfully ordered the termination of operations in finance companies, finance and securities companies and securities companies and the ORFIS had sold by auction the various claim rights without allowing the debtors to participate in the auction. Moreover, the auction was rushed such that the good debts had not been separated from the bad debts, which was an unlawful act. Even though the Ministry of Finance and the ORFIS had referred to the powers vested in them under the law on finance, securities and credit foncier businesses and section 7, section 8, section 16(3), section 23, section 25, section 27, section 30 bis, section 30 ter and section 30 quarter of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) and section 4 of the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998), such provisions of law were contrary to or inconsistent with the provisions of the Constitution on human dignity, rights and liberties of a person, the enactment of a law intended to apply to a particular case or person, unjust discrimination, the restriction of rights to property and the restriction of the liberty to undertake free competition under section 4, section 26, section 27, section 29, section 30, section 48 and section 50 of the Constitution. Therefore, the provisions of the law on finance, securities and credit foncier business, the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) and the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998) were unenforceable.

2. Preliminary issue

Can the Constitutional Court accept this application for consideration under section 264 of the Constitution ?

The Constitutional Court held that as regards the objection that nine sections of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) were contrary to or inconsistent with seven sections of the Constitution, such sections of the Emergency Decree were provisions of law which were to be applied to a case by the court and there had not yet been a ruling of the Constitutional Court on those relevant sections. This case was in accordance with section 264 paragraph one of the Constitution. The Constitutional Court therefore accepted this application for consideration.

3. The issues considered by the Constitutional Court

Pursuant to the application, in relation to the part where a request was made for the Min Buri Provincial Court to submit an opinion to object that the law on finance, securities and credit foncier business was contrary to or inconsistent with the Constitution, the Constitutional Court held that as the applicant did not clearly state in its application the specific number of the Finance, Securities and Credit Foncier Business Act and nor was there a specification of or wordings from which an inference could be made of the section to which the objection was made as being contrary to or inconsistent with the Constitution, this case was not in accordance with the rules under section 264 of the Constitution. Hence, this issue was not considered.

The issue considered by the Constitutional Court was whether section 7, section 8, section 16(3), section 23, section 25, section 27, section 30 bis, section 30 ter and section 30 tetra of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997), as amended by section 4 of the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998), were contrary to or inconsistent with section 4, section 26, section 27, section 29, section 30, section 48 and section 50 of the Constitution.

On the issue of whether the nine sections of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) were contrary to or inconsistent with section 4 and section 26 of the Constitution where related to human dignity, it was held as follows. Section 7, section 8, section 16(3), section 23, section 25, section 27, section 30 bis, section 30 ter and section 30 tetra of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997), a total of nine sections, were provisions on the role of the ORFIS and the ORFIS committee, being a State organization, in implementing the rehabilitation of companies whose operations had been suspended. The purpose was to remedy problems of the financial institution system and protect the depositors and creditors of such financial institutions in order to recall confidence in the financial institution system. Although such provisions might have restricted certain rights and liberties of those suspended companies, such rights and liberties only consisted of rights and liberties to engage in enterprises. Hence, the provisions of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) in all nine sections did not in any way impeach upon dignity of humans as defined by section 4 and section 26 of the Constitution.

As for the issue of whether nine sections of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) were contrary to or inconsistent with provisions of the Constitution on rights and liberties under section 4, section 26, section 27, section 29, section 30, section 48 and section 50, the following opinions were held.

The Constitutional Court considered the parts of the Constitution relating to the rights and liberties of persons under section 4 of the Constitution in conjunction with section 26,

section 27, section 29 and section 30 of the Constitution and was of the opinion that the Constitution offered equal protection of the rights and liberties of a person recognised by this Constitution. However, this did not mean that all rights and liberties recognised by this Constitution would not be restricted or discriminated. Such restriction of rights and liberties could be made on the condition that they were in accordance with the criteria in section 29 of the Constitution, i.e. the restriction should be for the purpose determined by the Constitution and only to the extent of necessity and provided that it should not affect the essential substances of such rights and liberties. Moreover, such a law should be of general application and should not be intended to apply to any particular case or person. As for discrimination, only those discriminations which were unjust were prohibited by section 30 of the Constitution.

As for the rights and liberties under section 48 and section 50 of the Constitution which the applicant claimed that the nine sections of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) were contrary to or inconsistent with, the applicant only referred to the first paragraphs of section 48 and section 50 of the Constitution. Such right and liberty were the right in property under section 48 and the liberty to engage in an enterprise or an occupation and to undertake a fair and free competition under section 50. In this regard, the end part of section 48 paragraph one contained the wording “the extent and the restriction of such right shall be in accordance with the provisions of the law”. In other words, the rights of a person in property could be restricted. Similarly, section 50 paragraph two contained a provision that “the restriction of such liberties under paragraph one shall not be imposed except by virtue of the law specifically enacted for maintaining the security and safety of the State or economy of the country...”, meaning that the liberty to engage in an enterprise or an occupation and to undertake fair and free competition could also be restricted. In any case, the restriction of rights in property under section 48 and the restriction of liberty to engage in an enterprise under section 50 of the Constitution had to comply with the criteria for restriction of rights and liberties stipulated in section 29 of the Constitution.

The Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) and the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998) were enacted in order to prescribe measures for a systematic remedy of the problems in financial institutions in line with international practice and to establish a State organisation to take charge and control of implementing such measures so as to rehabilitate the status of financial institutions as well as assist good faith depositors and creditors of such financial institutions. It was also necessary to have special measures to alleviate some stringency from usual cases in order that the ORFIS could complete its operations under the intentions of the law with utmost expediency. It was contemplated that the buyers of properties would be given some confidence as part of the solution to the economic crisis. These intentions of the law were embedded in the reasons for the promulgation of both Emergency Decrees on Reform of the Financial Institution System. Hence, such various sections of the Emergency Decrees which were claimed by the applicant

as being contrary to or inconsistent with various sections of the Constitution were provisions enacted in view of achieving the reasons for promulgated the two Emergency Decrees.

The enactment restricting rights and liberties were allowed by section 48 and section 50 of the Constitution. The provisions did not in any manner affect the rights and liberties under section 48 and section 50 of the Constitution because the debts of the debtors remained constant and no additional burden or obligations were imposed on the debtors. Any defence which the debtor might have against a creditor could still be raised against the new creditors. The Emergency Decrees on Reform of the Financial Institution System only provided for the practical procedures pertaining to the operations of the suspended company, procedures for assigning claim rights, sales and the effect of sales, different from the existing laws so as to create convenience and expediency in time for the remedy of the economic crisis. Moreover, the various sections of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) stated in the application were applicable on all companies that were unable to continue its operations and were suspended by Orders of the Minister of Finance. Therefore, the provisions were generally applicable on all companies with the same conditions. Section 7, section 8, section 16(3), section 23, section 25, section 27, section 30 bis, section 30 ter and section 30 quarter of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997) were neither contrary to nor inconsistent with section 4, section 26, section 27, section 29, section 30, section 48 and section 50 of the Constitution.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 7, section 8, section 16(3), section 23, section 25, section 27, section 30 bis, section 30 ter and section 30 quarter of the Emergency Decree on Reform of the Financial Institution System, B.E. 2540 (1997), as amended by section 4 of the Emergency Decree on Reform of the Financial Institution System (No. 2), B.E. 2541 (1998), were neither contrary to nor inconsistent with section 4, section 26, section 27, section 29, section 30, section 48 and section 50 of the Constitution.
