

The Constitutional Court
The Kingdom of Thailand

Constitutional Court Ruling

No. 9/2564 (2021)

Dated 30th June B.E. 2564 (2021)

Between	{	Narathiwat Provincial Court	Applicant
		-	Respondent

Re: Whether or not section 151 paragraph three and section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015) were contrary to or inconsistent with section 26, section 27 paragraph one and paragraph three, section 29 paragraph one and section 40 of the Constitution.

Narathiwat Provincial Court referred the objections of defendants (Mrs. Sunanta Payonrat, 1st defendant, Mr. Chaiya Jongpraw, 2nd defendant, Miss Romchalee Payonrat, 3rd defendant, and Mr. Wimolnet Kingkaew, 4th defendant) in criminal case no. (Black) Or. 720/2563, case no. (Red) Or. 1089/2563, requesting a Constitutional Court ruling under section 212 of the Constitution. The facts under the letter referring the objections of the four defendants and supporting documents could be summarized as follows.

Narathiwat Public Prosecutor, as the prosecution, filed an action against Mrs. Sunanta Payonrat, 1st defendant, Mr. Chaiya Jongpraw, 2nd defendant, Miss Romchalee Payonrat, 3rd defendant, and Mr. Wimolnet Kingkaew, 4th defendant, in Narathiwat Provincial Court. The 1st defendant was prosecuted for the offence of being the owner of a legally registered fishing vessel having a size from sixty gross tonnage up to one hundred and fifty gross tonnage which was used in a commercial fishing operation without installing a fishing vessel monitoring system and maintaining the operability of such system at all times. The 2nd to 4th defendants were prosecuted for the offences of being abettors or beneficiaries of the 1st defendant's wrongdoing under the Emergency Decree on Fisheries, B.E. 2558 (2015), as amended by the Emergency Decree on Fisheries (No. 2), B.E. 2560 (2017). The indictment could be summarized as follows. On 27th July B.E. 2562 (2019), the 1st defendant, being the owner of fishing vessel named Siripong 25, a purse surrounding net vessel, registered under the law on Thai vessels as a commercial fishing vessel, using purse

surrounding net, with 99.96 gross tonnage, violated Notification of the Ministry of Agriculture and Cooperatives, Re: Prescription of Fishing Vessel Sizes Subject to Control and Surveillance, B.E. 2560 (2017), and Notification of the Department of Fisheries, Re: Prescription of Rules and Procedures for Installing and Maintaining a Fishing Vessel Monitoring System for Commercial Fishing Vessels to Ensure Functionality at All Times, B.E. 2558 (2015). It was alleged that the vessel was used to conduct a commercial fishing operation by searching and catching aquatic animals without installing a fishing vessel monitoring system on the vessel, not maintaining the functionality of such system at all times, as well as the installation of the fishing vessel monitoring system assigned to Siripong 25 fishing vessel on other vessels, being violations of the law. The 2nd to 4th defendants jointly abetted by assisting and facilitating actions in the commission of the wrongdoing by the 1st defendant.

All four defendants objected that section 151 paragraph three of the Emergency Decree on Fisheries, B.E. 2558 (2015) was a provision which prescribed penalties for the offence under section 81(1) of the Emergency Decree on Fisheries, B.E. 2558 (2015). The fine of one million baht was inconsistent with the principle of proportionality since the penalty was excessively severe when compared to the four defendants' wrongdoing of failing to install a fishing vessel monitoring system and not maintaining the functionality of such system at all times as prescribed by law. Such provision of law did not provide a minimum or maximum fine, not allowing the court to exercise a sentencing discretion when stipulating a fine on all four defendants as appropriate, caused injustices in the case. In addition, the fine prescribed in section 151 paragraph three was greater than the fine under section 151 paragraph one and paragraph two, despite an offender using a vessel which could differ in size by merely one gross tonnage. As a consequence, the court did not have discretion to deliver justice for a particular case. As for section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015), which provided that an abettor of an offence under the Emergency Decree on Fisheries, B.E. 2558 (2015) had to be liable to the same penalty as the principal offender, resulted in the 2nd defendant, crew member of Siripong 25 fishing vessel, the 3rd defendant, the 1st defendant's daughter performing the duties of overseeing the business on behalf of the 1st defendant and the 4th defendant, the master of Siripong 25 fishing vessel, being liable to the same penalty as the 1st defendant, the vessel owner and fishing business operator, despite the 2nd to 4th defendants merely being abettors and employees. The prescription of criminal liability under such provisions was disproportionate to the wrongdoings of the 2nd to 4th defendants. Furthermore, section 166 provided for judicial discretion to refrain from sentencing or to deliver a lighter sentence to crew members, but without an exception for the master who was

also an employee, as was the case of other crew members, despite the fact that the actions of a master in abetting the wrongdoing was done in pursuance of the direction of the vessel owner as was the case of crew members. As a consequence, the 4th defendant did not benefit from such exception. Hence, there was unfair discrimination against the 4th defendant, which was also contrary to the principle of equality. Therefore, section 151 paragraph three and section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015) was a provision which was contrary to the rule of law, principle of proportionality and principle of equality. The provision increased a burden and disproportionately restricted the right or liberty of a person, in particular the liberty to engage in an occupation, and prescribed a penalty which was heavier than the offence. Hence the provision was contrary to or inconsistent with section 4, section 26, section 27, section 29 and section 40 of the Constitution.

Narathiwat Provincial Court found that all four defendants objected that section 151 paragraph three and section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015) was contrary to or inconsistent with section 4, section 26, section 27, section 29 and section 40 of the Constitution. The court was going to apply such provisions of law to a case and there had not yet been a ruling of the Constitutional Court in relation to such provisions. The objection was therefore referred to the Constitutional Court for a ruling under section 212 paragraph one of the Constitution.

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the competence to accept the written referral of objection for deliberations and ruling pursuant to section 212 paragraph one of the Constitution. The Constitutional Court found as follows. Narathiwat Provincial Court referred the objections of four defendants to the Constitutional Court for a ruling that section 151 paragraph three and section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015) was contrary to or inconsistent with section 4, section 26, section 27, section 29 and section 40 of the Constitution. Such provisions of law were provisions which Narathiwat Provincial Court was going to apply to a case. When all four defendants filed objections along with reasons that such provisions of law were contrary to or inconsistent with the Constitution and there had not yet been a prior Constitutional Court ruling in relation to such provisions, the case was in accordance with section 212 paragraph one of the Constitution. An order was therefore issued to accept the matter for consideration. In the interest of proceedings, the Director-General of the Fisheries Department was directed to give an explanation of reasons and necessities of the prescription of penalties under section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015), which provided the same penalty for an abettor or beneficiary of an offence under this Emergency Decree as the principal offender, as well as to submit relevant documents.

The Director-General of the Fisheries Department explained that in the year B.E. 2554 (2011), Thailand ratified the United Nations Convention on the Law of the Sea, 1982: UNCLOS 1982. As a consequence, Thailand was under an obligation to revise its internal laws to modify its management of aquatic living resources in line with the principles under the convention. The Fisheries Act, B.E. 2490 (1947) was repealed and the Fisheries Act, B.E. 2558 (2015) was promulgated. However, the latter act still lacked clarity and was not consistent with international standards. The European Commission issued a formal warning designating Thailand as a non-cooperating country in the fight against illegal, unreported and unregulated fishing (IUU Fishing) pursuant to Council Regulation (EC) No. 1005/2008 on establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing. It was recommended that Thailand took actions to amend laws to align with international laws. Therefore, the Emergency Decree on Fisheries, B.E. 2558 (2015) was enacted to reform the management of aquatic living resources and fisheries in line with international standards. Due to the fact that an abettor of an offence or beneficiary of an offence was in all events involved in causing illegal fishing, thus to prevent and deter such illegal fishing, section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015) provided that an offender, abettor and beneficiary of an offence under this Emergency Decree were all liable to the same penalty.

The Constitutional Court considered the objections of all four defendants, explanations of relevant agencies and supporting documents and found that this case raised a legal question and there was sufficient evidence for deliberations and ruling. The inquisitorial proceedings were therefore concluded under section 58 paragraph one of the Organic Act on Procedures of the Constitutional Court, B.E. 2561 (2018).

As for the objections of all four defendants on whether or not section 151 paragraph three and section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015) were contrary to or inconsistent with section 4 of the Constitution, the Constitutional Court found as follows. Upon consideration of the facts in the objections, it did not appear that the four defendants showed reasons to support the objection on how such provisions of law were contrary to or inconsistent with section 4 of the Constitution. The case was not in accordance with the rules under section 212 paragraph one of the Constitution. A party had to file an objection together with reasons on how a provision of law was contrary to or inconsistent with the Constitution. In addition, section 4 was a provision which laid down the principle of human dignity, rights and liberties as well as the equality of persons. There was

no specific provision which laid down a principle on the protection of a right or liberty. Hence, there was no need to give a ruling in this regard.

The Constitutional Court determined that the issues which required a ruling was whether or not section 151 paragraph three and section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015) was contrary to or inconsistent with section 26, section 27 paragraph one and paragraph three, section 29 paragraph one and section 40 of the Constitution.

After deliberations, the Constitutional Court found as follows. Section 26, section 27 paragraph one and paragraph three, section 29 paragraph one and section 40 of the Constitution were provisions in Chapter 3, Rights and Liberties of the Thai People. Section 26 paragraph one provided that “the enactment of a law which results in the restriction or a right or liberty of a person must be in accordance with the conditions provided by the Constitution. In the case where the Constitution does not provide a condition, such law must not be inconsistent with the rule of law, not increase a burden or disproportionately restrict a right or liberty of a person, and shall not prejudice a person’s human dignity. The reasons and necessities for the restriction of right and liberty must also be specified.” Paragraph two provided that “a law under paragraph one must apply generally and not be specifically directed to any particular case or person.” Section 27 paragraph one provided that “persons are equal before the law. Persons have rights and liberties and enjoy equal protection under the law.” Paragraph three provided that “unfair discrimination against a person whether due to a difference in place of birth, race, language, sex, age, disability, physical or health condition, personal status, economic or social standing, religious faith, education and training or political views that are not inconsistent with the provisions of the Constitution or any other cause is prohibited.” Section 29 paragraph one provided that “a person shall not be liable to a criminal penalty except where there is a commission of an act for which the law in force at the time of such commission stipulates an offence and a penalty, and the penalty imposed on such person cannot be heavier than as provided by the law in force at the time of commission of offence.” Section 40 paragraph one provided that “a person has the liberty to engage in an occupation.” Paragraph two provided that “restriction of a liberty under paragraph one is prohibited except where done by virtue of a provision of law enacted for the preservation of national security or economy, fair competition, prevention or elimination of barrier or monopoly, consumer protection, regulation of an occupation to the extent of necessity or other public benefit.” Paragraph three provided that “the enactment of a law to regulate an occupation under paragraph two must not have the character of discrimination or

an interference in the management of educational services by an educational institution.”

Section 81(1) of the Emergency Decree on Fisheries, B.E. 2558 (2015) provided that “an owner of a vessel registered under the law on Thai vessels for fishing purposes and having the size stipulated by notification of the Minister must take the following actions: (1) install a vessel monitoring system and maintain the functionality of such system at all times in accordance with rules and procedures prescribed by notification of the Director-General.” Section 151 paragraph one provided that “a person who violates section 81(1) or (4) or section 88(1) or (7) shall be liable to a fine of twenty thousand baht.” Paragraph two provided that “if an offender under paragraph one uses a vessel from twenty gross tonnage up to sixty gross tonnage, such offender shall be liable to a fine of two hundred thousand baht.” Paragraph three provided that “if an offender under paragraph one uses a vessel from sixty gross tonnage up to one hundred and fifty gross tonnage, such offender shall be liable to a fine of one million baht.” Finally, paragraph four provided that “if an offender under paragraph one uses a vessel from one hundred and fifty gross tonnage or more, such offender shall be liable to a fine of four million baht.” Section 166 provided that “an abettor or beneficiary of an offence under this Emergency Decree shall be liable to the same penalty as the principal offender, except where such person is a crew member and the court finds that the act was done pursuant to an order of the owner or master of the vessel, the court may refrain from imposing a penalty or impose any lighter penalty than as provided by law for such offence.”

The reasons for promulgation of the Emergency Decree on Fisheries, B.E. 2558 (2015) were as follows. Thailand found it necessary to reform the management of aquatic living resources and fisheries in line with international standards, in particular, the United Nations Convention on Law of the Sea 1982 to which ratification was given, as well as to comply with the formal warning notice of the European Commission. Therefore, to prevent impact on fisheries and the preservation of national economic security, the law on fisheries is therefore revised with regard to the management of fisheries, installation of monitoring, control and surveillance systems of fishing in Thai waters and outside of Thai waters, and to prescribe guidelines for the conservation and management of fisheries and aquatic animal resources to allow sustainable utilization. Measures for the control, surveillance, tracing and inspections of fisheries were prescribed for the prevention, deterrence and elimination of illegal fishing. As for penalties, revisions were made to criminal penalties for suitability and proportionality with the wrongdoings. The prescription of fines and rates of fines under section 151 of the Emergency Decree on Fisheries, B.E.

2558 (2015), had the objective of the effective enforcement of laws and deterrence of violations of provisions of law in order to achieve the objectives pursuant to the spirit of the law in having measures for monitoring, inspection, control and surveillance of fisheries, for the prevention, suppression and restraint of wrongdoers. Consideration was given to the losses on aquatic living resources and the benefits received by the wrongdoers. The incentives for wrongdoing were removed since the wrongdoer would not acquire a benefit from the actions. The fine rates were proportionate to the size of vessel, having regard to the fishing capacity since larger fishing vessels would have a greater fishing capacity both in terms of vessel size and fishing gear size and type, engine size and number of fishing labour for catching aquatic animals when compared to smaller fishing vessels. The increase of penalties under section 151 paragraph one to paragraph four had taken into consideration the order of seriousness. It was still premised on the same concept and principle as section 151 paragraph four of the Emergency Decree on Fisheries, B.E. 2558 (2015), for which the Constitutional Court had already given a ruling in Ruling No. 14/2563 that section 151 paragraph four of the Emergency Decree on Fisheries, B.E. 2558 (2015), despite the high fine rates and the prescription of a fixed rate fine without an upper and lower limit, was consistent with the principle of prescribing a proportionate penalty in accordance with the vessel size, consistent with the value of catch obtained from the commission of an offence. Furthermore, the court had a discretion to lower such penalty when there was a cause for mitigation of penalty under section 78 of the Penal Code, as appropriate for each case. The prescription of fines pursuant to such rate was proportionate to the severity of the offence and benefits obtained by the offender. The provision was therefore neither contrary to nor inconsistent with section 4, section 26, section 29 and section 40 of the Constitution. Therefore, the prescription of fine penalties under section 151 paragraph three of the Emergency Decree on Fisheries, B.E. 2558 (2015), under which the use of a vessel from sixty gross tonnage up to one hundred and fifty gross tonnage would lead to a fine liability of one million baht, despite the high value of the fine and characteristics of a fixed rate without upper and lower limits, was in accordance with the principle of proportional prescription of penalties according to the vessel size, consistent with the value of catch obtained from the offence. The penalty was also a disincentive for the commission of offence since an offender would not benefit from such act. The penalty was therefore appropriately proportional to the seriousness of the offence and benefits obtained by the offender. There was no increase in burden or restriction of right or liberty of a person that was disproportionate, and was not contrary to the rule of law, not prejudicial on human dignity, and was a law that was generally applicable and not

directed to any particular case or person as provided under section 26 of the Constitution. There was no unfair discrimination, and was consistent with the principle of equality under section 27 paragraph one and paragraph three of the Constitution. There was no imposition of penalty on a person that was heavier than the penalty provided by law that was in force at the time of offence pursuant to section 29 paragraph one of the Constitution. Even though there was some restriction on the liberty to engage in an occupation, such restriction was imposed in the interest of preserving the security of aquatic living resources, being a national economic security, in accordance with conditions under section 40 of the Constitution. Therefore, section 151 paragraph three of the Emergency Decree on Fisheries, B.E. 2558 (2015) was neither contrary to nor inconsistent with section 26, section 27 paragraph one and paragraph three, section 29 paragraph one and section 40 of the Constitution.

As for the objection that section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015) was contrary to or inconsistent with section 26, section 27 paragraph one and paragraph three, section 29 paragraph one and section 40 of the Constitution, the Constitutional Court found as follows. The international obligation ratified by Thailand resulted in a need for Thailand to revise laws to clarify certain issues and suppress illegal fishing caused by wrongdoers who could become involved in many forms. This ensured effective enforcement of laws, deterrence of wrongdoings and fighting violations of provisions of laws. The law should achieve the objectives pursuant to the spirits of the law in preventing, suppressing and deterring illegal fishing. An abettor or beneficiary of an offence under this Emergency Decree played a part in causing illegal fishing. Section 166 was an important measure against any person who would assist or facilitate another person in the commission of illegal fishing to cease and refrain from abetting such offence. Upon calculating the returns or benefits received from the commission of offence in the same way as the principal, the detrimental effect from the offence was greater than the benefits objected. Furthermore, such provision was not an absolute provision. The court had the power to grant an exemption for crew members. Where the court found that the actions were committed pursuant to an order of a vessel owner or master, the court could refrain from imposing a penalty or impose any lesser penalty, which was a prescription of penalty that was appropriate to circumstances and the characters of the offender. A crew member had operational duties on a vessel, which differed from the master who had a duty of controlling a vessel and was responsible for the fishing vessel, overseeing that the fishing vessel monitoring system remained operable at all times, while the vessel was in a fishing operation as well as while it is docked at port. Section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015)

was therefore appropriately proportionate to the seriousness of the offence and benefits obtained by the offender. The provision did not disproportionately increase a burden or restricted a right or liberty of a person, was not contrary to the rule of law, did not prejudice human dignity, was a law that was generally applicable and was not directed at any particular case or person as provided under section 26 of the Constitution. The provision was not an unfair discrimination and was consistent with the principle of equality under section 27 paragraph one and paragraph three of the Constitution. The provision did not prescribe a penalty to be imposed on a person that was heavier than the penalty provided by the law in force at the time of the offence under section 29 paragraph one of the Constitution. Even though there was some restriction on the liberty to engage in an occupation of a person, the restriction of liberty was imposed in the interest of preserving the security of aquatic living resources, which was the country's economic security, in accordance with the conditions under section 40 of the Constitution. Therefore, section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015) was neither contrary to nor inconsistent with section 26, section 27 paragraph one and paragraph three, section 29 paragraph one and section 40 of the Constitution.

By virtue of the aforesaid reasons, the Constitutional Court held that section 151 paragraph three and section 166 of the Emergency Decree on Fisheries, B.E. 2558 (2015) were neither contrary to nor inconsistent with section 26, section 27 paragraph one and paragraph three, section 29 paragraph one and section 40 of the Constitution.
