

## **Decision of the Constitutional Tribunal to dissolve Thai Rak Thai - A legal analysis**

On 30 May 2007, the Constitutional Tribunal issued an order No. 3-5/2007 Re: The Attorney-General request for the dissolution of the Pattana Chart Thai Party, Pandin Thai Party and Thai Rak Thai Party (“Order”). The Order states to dissolve the 3 Parties and to suspend the electoral rights of the executive members of the 3 Parties for 5 years.

The Thammasat University’s lecturers, name below, have studied the Orders and believe that for the greater benefit of legal education, it is proper to submit this analysis.

There are several legal issues of the Order worth consideration, however, due to certain limitations and constraint, the analysis will focus on the legal issue which may cause major impact on the future of the Thai legal system; the Suspension of Electoral Rights of Person.

### **1. The Decision**

1.1 When the Constitutional Tribunal issued the Order dissolve Pattana Chart Thai Party, Pandin Thai Party and Thai Rak Thai Party, based on the Council for Democratic Reform Announcement No. 27 (the “Announcement No.27”), Chapter 3, the Constitution Tribunal also decided to suspend the electoral rights of the executive member of those 3 Parties for 5 years.

1.2 The reasons of the Constitutional Tribunal for applying the Announcement No. 27, Chapter 3, as the fundamental law to suspend the electoral rights of the executive members of those 3 Parties can be summarized as follows:

The Announcement No. 27 was issued on 30 September 2006, while the actions that lead to the 3 Parties dissolution took place from February 24 until 2 April 2006. The Announcement No. 27 can apply retroactive to the executive members of the 3 Parties. The legal principle that any law which would make activities which had been previously legal illegal are prohibited shall not in this case, be applied. The Tribunal view that the above mentioned principle as enshrined in various Constitution of the Kingdom of Thailand and as stated in Section 2 of the Criminal Code applies only to criminal offense. The suspension of the electoral rights does not justify as a criminal action but it is a legal effect by the operation of law that gives the power to dissolve the Party. In addition, the laws prescribes whether as not a person should have electoral rights. Therefore, enforcing a retroactive law against the 3 Parties is in accordance with the Council for Democratic Reforms’ Announcement.

1.3 Before we begin the analysis whether the law can be applied retroactive, we should consider the Announcement No. 27 which is fundamental to the decision of the Constitution Tribunal.

## 2. The Announcement No. 27 as the enforcement law of the case

- 2.1 None of the 3 Parties has raised the issue whether the Announcement No. 27 is in accordance with legal principles of the Constitutional. Though the Tribunal is entitled to raise the issue, it did not do so.
- 2.2 To fully understand the reason and rational of the decision, observations and remarks in regards to the Announcement No. 27 shall be considered even though they were not part of the Decision.
- 2.3 First, the Announcement No.27 was issued by a panel that had carried out the coup d'e tat. It is not a law that had been enacted by a democratic government. In addition, the Constitution Tribunal enforced Announcement No.27 during the period when the government was lead by the Council for Democratic Reform.
- 2.4 Secondly, the Announcement No. 27 was made “...in order to clarify the enforcement of the Organic Act of the Constitution of the Kingdom of Thailand on Political Parties of B.E. 2541, as well as to indicate the suspension of the electoral rights of the relevant person connected with illegal action only”. Let’s consider the circumstances by which the Head of the Council for Democratic Reform who signed the Announcement gave an interview to reporters on several occasions, revealing the real motive of the Announcement. When asked whether the purpose of the Announcement was to deal with a major political party or not, the Head of the Council for Democratic Reform said that “I did it for the country”. On another occasion, when giving an interview to the executive management of the Nation Group, the question was about the dissolution of Thai Rak Thai Party, the Head of the Council for Democratic Reform answered “on process, assigned to the Royal Decree Council...” It is very important that the Constitutional Tribunal must bring up such circumstances in order to consider that the Announcement No. 27, especially Chapter 3, whether it was in “*the public interest*” which upholds the principle of Legal State as whether such Announcement No.27 was intended for “other purpose” which is not legitimate.
- 2.5 Thirdly, the nature of the Announcement No. 27, if it is in accordance with legal principles and the principle stipulated in the Constitution of the Kingdom of Thailand B.E. 2540. Legal enforcement in respect of the people, especially the law that defines the limitation of rights and freedom shall be the general enforcement and is not intended to provide enforcement in respect of a specific event or certain person.
- 2.6 We should also observe the fact whether. The Announcement No. 27 is a law intended to give general enforcement or to give specific enforcement against certain person. The latter case can only be regarded as illegal in the light of international principles of law.

After reviewing the Announcement No.27, particularly Chapter 3, as well as other circumstantial evidence prescribed earlier, the remark whether the Announcement No.27, being the law intended to enforce specifically upon

certain person is not acceptable in accordance with the Rules of Law and general constitution law.

- 2.7 Although Announcement No. 27 is the enforcement law of the case, neither the respondents nor the Constitutional Tribunal brought up the issue to support the case. General circumstances of the said Announcement may give rise to the suspicion that there is a problem in connection with the appropriateness under the principle of general constitutional law and State Law.

### **3. Enforcing a Retroactive Law – Breach of International Legal Principles**

- 3.1 From the reasons given by the Constitutional Tribunal that the law shall not apply retroactive only for criminal offense, it is worth considering the following: (1) when does a law become effective and (2) whether it is correct that a law can be retroactively applied only to criminal offences.

- 3.2 General Principles of Law stipulate that the commencement of the effectiveness of the law must be in accordance with such laws. If there is no commencement date specified in the law, the effective date of such law shall be the date of the announcement. The Announcement No. 27 was made on 30 September 2006 and there is no enforcement date specified in the Announcement No. 27. Therefore it is deemed that the effective date of Announcement No. 27 is 30 September 2006. The Constitutional Tribunal did not consider this issue in its decision. This matter is a fundamental legal concept of law enforcement. However, the Constitutional Tribunal considered only the legality of applying the Announce No. 27 retroactively. It is obvious that Announcement No. 27 did not contain a retroactive clause. Therefore it can only be assumed that the effective date of enforcement of Announcement No. 27 is 30 September 2006.

- 3.3 In accordance with the state governance principles and the Rule of Law, in order for citizens or public to trust the state or government, the state has a duty to make itself governed under the principle of the prohibition of an issuance and enforcement of a retroactive law to any person. Thus, if the action of any person is not illegal at present, the state has no authority to issue any law on the following day in order to stipulate that such action is illegal. On the other hand, if a person was punished in accordance with present law, the state has no authority to enact a law on the following day in order to raise the punishment and enforcing it against a person retroactively.

- 3.4 It is deemed that any state must respect this principle of no law shall apply retroactively. If a state neglects or ignores such principle, a person shall not trust or rely on the proper use of state power. Once the public has no faith nor trust in the state, the Rules of Laws will not be respected nor sustainable, The reason is that any person should live a life as normal as possible without the interference of the state and the state shall not use its power in a way of reducing the rights and freedom of any person.

- 3.5 The next issue which needs to be considered is whether a law can be enforced retroactively for criminal offences only.

- 3.6 Civilized countries, when applying a law retroactively, do not distinguish between criminal and civil offences. For example, the Constitutional Tribunal of France decided on 30 October 1982 that in relation to tax punishment the law should be applied retroactively to any person whether it is a criminal or civil offence. The Constitutional Tribunal of Germany ruled that punishment of any person for his/her past actions based on a retroactive law is prohibited.
- 3.7 From the examples of France and Germany, it can be seen that the degree of applying a law retroactively varies greatly. Each state must consider carefully if it allows the application of a law retroactively, taking into account all circumstances and the necessity of having a law applied retroactively. However, applying a law to actions retroactively which make these actions criminal offences, must be an exception. In applying this exception one must use utmost care and also take into consideration the seriousness of punishment together with other circumstances.
- 3.8 The question remains whether it was reasonable when the Constitutional Tribunal considered that a law can only be applied retroactively to criminal offences only based on the past Constitution of the Kingdom of Thailand and section 2 of the Criminal Code.
- 3.9 Lecturers of the Thammasat University of Thailand (Dr. Worajade Pakerat, Assistance Professor, Prasit Piwawatanapanich, Assistance Professor, Dr. Dhapanan Nipittakul, Lecturer, Mr. Piyabutra Sangkanokkul, Lecturer, Mr. Teera Sutevarangkul, Lecturer) considered the reasons given by the Constitutional Tribunal and concluded that the reasons were materially incorrect. As a general principle of law, the laws shall not be applied retroactively to prejudice any person. However, since criminal offence may have severe impact upon life, body and property of a person, this general principle of laws have been expressly stated in Criminal Code as well as the Constitution of the Kingdom of Thailand By so doing does not change or lessen the necessity of this principle to other wrong doing nor notion, whether a criminal offence or not.
- 3.10 Considering the facts of this specific case, the suspension of electoral rights, electoral rights are fundamental rights of any person in a democracy. Any person must be able to exercise this right in a democracy. The reasons given by the Constitutional Tribunal by referring to legal grounds in some circumstances allowing for suspension of electoral rights are acceptable.
- 3.11 Besides, such law enforcement shall be applied to actions in the future and only after the law becomes effective. The Constitutional Tribunal should have considered all the facts in order to ensure the protection of fundamental rights and freedom of individuals.
- 3.12 At the moment, Thailand is under a military Government effected by a coup d'état, abolishing the authority of a civil government lead by the 3<sup>rd</sup> respondent (Thai Rak Thai Party). It is crucial to mention that the legal authority in charge is the opponent to the respondent. The rightness of the Announcement No. 27 was abolished by section 36 of the Constitution of the Kingdom of Thailand (temporary) B.E. 2549. The Constitutional Tribunal

used Announcement No. 27 to enforce the limitation of fundamental rights. The Constitutional Tribunal can only stand on the ground that the decision was made by “*Power is Jurisprudence*” or “*Jurisprudence is Power*”.

- 3.13 The reason given by the Constitutional Tribunal was only that Announcement No. 27, Chapter 3 can be applied retroactively to the 3 respondents because the suspension of electoral rights is not considered criminal punishment. This reason is not only unacceptable but raises severe concern regarding any decision made by the Constitutional Tribunal in the future. It is of utmost importance that this decision is not used as a precedent when enacting a law limiting the rights and freedom of individuals. Because of the decision of the Constitutional Tribunal based on the reasons mentioned above, it is doubtful if the people trust and rely on the proper use of state power - any responsible individual will decline this.

Because of the reasons mentioned above, the lecturers of the Thammasat University (Faculty of Law) named above, would like to express their disagreement with the decision of the Constitutional Tribunal.

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