

Are Secret Trials Compatible with Liberties and Rights?

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According to the recent ruling of the Constitutional Court in relation to the case of Daranee Charnchoengsilpakul, the answer to this question is yes. While further information about the ruling and its implications will unfold over the next few days and weeks, a few preliminary observations are in order.

On 9 February 2011, the Appeal Court vacated the original ruling and referred the case of Daranee Charnchoengsilpakul to the Constitutional Court, noting that the original decision by the examining judge in the Court of First Instance to hold her trial in camera may have been unconstitutional. Daranee was accused of violating Article 112 of the Thai Criminal Code [the lèse majesté law], and the Court of First Instance cited concerns of national security as the reason for holding the trial behind closed doors. There are at least two possible interpretations of the logic behind this decision. First, given that the words she was prosecuted for uttering were spoken on Sanam Luang, this concern was hollow but may also refracts the fear and apprehension within the establishment [whoever they may be] about dissident speech in any form. One might think that dissident speech would be disciplined once inside the courtroom, but apparently the judge in the Court of First Instance worried otherwise. Second, this may have simply been another way for the Court to restrict the rights of a dissident citizen. By citing ‘national security’ [and then conflating it with the monarchy], it became difficult, if not impossible, to question.

At the time, the most pressing issue was whether or not Daranee would be released while the Constitutional Court conducted its examination. Given that the Appeal Court vacated the ruling against her, this would seem possible, if not de rigueur. Yet her request for bail was denied. As close followers of the case are aware, she faces severe health problems that are unable to be treated within the general prison healthcare system and has continually requested that she be allowed to seek proper medical care. Within this context the denial of bail while the Constitutional Court examined the case is inhumane as well potentially procedurally suspect.

Beyond the immediate question of whether or not Daranee would be granted bail, a thorny question of conflict between the Criminal Procedure Code (CPC) and the 2007 Constitution loomed. At that time, I wrote about potential stakes in the decision and argued that while the issue was presented as procedural, the very issue of justice was also on the line. This is even clearer now that the Constitutional Court has issued their examination of the case. What is in question is the relationship between Article 177 of the CPC and Articles 29 and 40 of the 2007 Constitution.

Article 177 of the CPC reads:

“The court has the power to order a secret trial when it is suitable either via the court’s own authority or the request of either party in the case. It must be for the benefit of the peacefulness and order or good morals of the people, or to protect secret state information related to the safety of the country from being known by the people” [“ศาลมีอำนาจสั่งการพิจารณาคดีลับเมื่อเห็นว่าสมควรไม่ว่าจะด้วยอำนาจศาลเองหรือด้วยคำขอของฝ่ายใดในคดีก็แต่ต้องมีประโยชน์แก่ความสงบเรียบร้อยและศีลธรรมอันดีของประชาชน หรือเพื่อรักษาความลับของราชการซึ่งเกี่ยวกับความมั่นคงปลอดภัยของประเทศมิให้ประชาชนล่วงรู้”]

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Article 29 of the 2007 Constitution reads:

“The restriction of rights and liberties of a person as recognized by the Constitution shall not be imposed except by virtue of law specifically enacted for the purpose determined by this Constitution and to the extent of necessity and provided that it shall not affect the essential substances of such rights and liberties” [.....
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Part 2 of Article 40 of the 2007 Constitution, which addresses the rights of citizens in a judicial process, notes that these rights:

“shall consist at least of the right to public trial; right to be adequately informed of the facts and to inspect documents, right to present one’s facts, defenses and evidence, right to object to judges, right to be considered by the full bench of judges, and right to be informed of the reasons for a ruling, judgment or order”
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The tension between the CPC and the Constitution is unmistakable. What are the meanings of the words “necessity,” “rights,” and “liberties” in this phrase in Article 29: “the extent of necessity and provided that it shall not affect the essential substances of such rights and liberties.” In the examination posted as a PDF file on the website of the Constitutional Court, the Court itself does not shy away from the importance of this case. In fact, as is noted several times in the four-and-half pages of text, the Court has never before examined the constitutionality of Article 177 of the Criminal Procedure Code.

So what did they decide? The full decision can be read on Prachatai, but here is a rough translation of the crucial passage [emphasis added]:

“Examination in secret does not mean that either side will not be treated fairly in the judicial process and does not in any way restrict the rights of the defendant in a criminal case. This is because in regards to examination in secret, Article 178 of the Criminal Procedure Code mandates that involved individuals have the right to be in the courtroom, such as the plaintiff and the plaintiff’s lawyer, the defendant and the defendant’s lawyer, the defendant’s guards, witnesses, experts, interpreters, etc. This shows that Article 177 of the Criminal Procedure Code is an article in line with the basic rights for individuals in the justice system put in place by the Constitution even though it has some limiting effects on the rights and freedoms of individuals. But this is a limiting of individual rights and freedoms only to the extent that it is necessary. There are no significant repercussions on rights and freedoms ”

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No significant effects on rights or freedoms? 真的嗎? By placing the emphasis on Articles 177 and 178 of the CPC, rather than the issue of what constitutes national security, the Constitutional Court seems to suggest that trials held behind closed doors are absolutely fine. While I am relieved that the Court has affirmed the importance of defendants being present during a trial, this is a deeply concerning ruling. It is worth asking what it means when the public is excluded from observing a trial – in a democracy, or a state which claims to be one, is the public not a relevant and involved party to a court case?

P.S.

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<http://prachatai.com/english/node/2668>