

The Constitutional Court
The Kingdom of Thailand

Constitutional Court Ruling
No. 4/2563 (2020)

Dated 19th February B.E. 2563 (2020)

Between	{	Miss Srisamai Chueachat	Applicant
		-	Respondents

Re: Miss Srisamai Chueachat (applicant) requested for a Constitutional Court ruling under section 213 of the Constitution.

Miss Srisamai Chueachat (applicant) requested for a Constitutional Court ruling under section 213 of the Constitution. The facts under the application and supporting documents could be summarized as follows.

The applicant was a former Director of Kuiburi Hospital and is a medical doctor in the network of volunteer doctors for medical termination of pregnancies in accordance with laws and Medical Council regulations for teenagers and unprepared pregnancies. The applicant was also a committee member of the Referral System for Safe Abortion pursuant to Department of Health Order No. 207/2560, dated 8th March B.E. 2560 (2017). The applicant was arrested by a police officer and charged with the offence of performing an abortion with the woman's consent under section 302 of the Penal Code, despite provisions giving a medical doctor the authority to do so under section 305 of the Penal Code, which had led to arrests and charges of termination of pregnancies on unprepared service recipients pursuant to section 301 of the Penal Code. The applicant was subsequently transferred to another official post at the Community Health Center of Hua Hin Hospital 5. The applicant claimed that section 301 and section 305 of the Penal Code raised questions of consistency with section 27, section 28 and section 77 of the Constitution, since section 301 of the Penal Code provided penalties essentially only for a woman whose pregnancy had been aborted despite the fact that a pregnancy could not be caused by the unilateral action of a woman. A man in a relationship with the woman must also bear responsibility and be penalised. Such provision of law therefore caused an inequality of legal protection between men and women under section 27 of the Constitution. Furthermore, a woman had the right and liberty to life and body, with

bodily autonomy under section 28 of the Constitution. As for section 305 of the Penal Code, this provision was inconsistent with circumstances and lagged behind current advancements in medical technology which stressed on the use of medicinal abortion rather than surgical abortion. The provisions in that section, which focused on the protection of medical practitioners but lacked protection for other health personnel providing services under the supervision of a medical practitioner, were therefore inconsistent with section 77 of the Constitution, which provided that the state should enact laws only to the extent of necessity and should repeal or revise laws that were no longer necessary or inconsistent with circumstances, or that posed obstacles to ways of lives or engagement in occupations. In any case, the applicant proposed an amendment to section 305 of the Penal Code to include persons engaging in medical practices, persons under the supervision of a medical practitioner, and to provide an exemption from liability in the event a pregnancy that had not progressed beyond 12 weeks, or a pregnancy which affected the mental health of such woman, or the foetus exhibited a disability or high risk of genetic disorder.

The applicant submitted an application to the Ombudsman. The Ombudsman notified the applicant of the outcome of considerations that section 301 and section 302 of the Penal Code, despite raising practical issues, did not yet constitute a problem of unconstitutionality which the Ombudsman could submit the matter together with an opinion to the Constitutional Court under section 23(1) of the Organic Act on Ombudsmen B.E. 2560 (2017).

The applicant therefore requested for a Constitutional Court ruling under section 213 of the Constitution as follows:

(1) that section 301 of the Penal Code raised a problem of inconsistency with section 27 and section 28 of the Constitution;

(2) that section 305 of the Penal Code raised a problem of inconsistency with section 27, section 28 and section 77 of the Constitution;

(3) that a ruling of the Constitutional Court should come into effect 540 days after the ruling was read with a condition that an organ, state agency or relevant person should revise the law and report compliance or compliance problems to the Constitutional Court within 360 days and 500 days as from the Constitutional Court ruling.

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the competence to accept this application for a ruling under section 213 of the Constitution. The Constitutional Court found as follows. In this case, the applicant claimed that she was a former director of Kuiburi Hospital, a medical doctor in the network of volunteer doctors for medical

termination of pregnancies in accordance with the law and Medical Council regulations for unprepared teenage pregnancies and a committee member of the Referral System for Safe Abortion. The applicant was arrested by an officer and charged with an offence under section 302 of the Penal Code, which also led to the arrest and charges against women terminating pregnancies under section 301 of the Penal Code. The applicant was subsequently transferred to perform official functions at the Community Health Center at Hua Hin Hospital 5. The applicant submitted a complaint to the Ombudsman and the Ombudsman decided not to submit an application to the Constitutional Court. The applicant therefore requested for a Constitutional Court ruling that section 301 of the Penal Code was contrary to or inconsistent with section 27 and section 28 of the Constitution, and that section 305 of the Penal Code was contrary to or inconsistent with section 27, section 28 and section 77 of the Constitution. Upon a finding of facts that the police officer's legal proceedings against the applicant under section 302 of the Penal Code was a direct consequence of the applicant performing consensual abortion, being an offence under section 301 of the Penal Code, the applicant claimed that section 301 of the Penal Code, which was directed at penalizing only a woman undergoing an abortion, but did not penalize the man who had a relationship with the woman, caused an inequality under the law pursuant to section 27 and section 28 of the Constitution. It was further claimed that the applicant did not receive protection under section 305 of the Penal Code due to the lack of exemption for a medical doctor's action in the event of a woman exercising the right to have a safe termination of pregnancy. Hence, it was claimed that such provisions of law were contrary to or inconsistent with section 27, section 28 and section 77 of the Constitution. In this case, the applicant was therefore a person whose right or liberty recognised by the Constitution had been violated, and the applicant was of the opinion that such a violation was a consequence of section 301 and section 305 of the Penal Code, being contrary to or inconsistent with the Constitution. The case was therefore in accordance with the rules, procedures and conditions under section 213 of the Constitution in conjunction with section 48 paragraph one and paragraph two of the Organic Act on Procedures of the Constitutional Court B.E. 2561 (2018). The Constitutional Court therefore ordered the acceptance of the application for a ruling.

Upon examining the application and supporting documents, the Constitutional Court determined that the following issues had to be decided.

The first issue was whether or not section 301 of the Penal Code was contrary to or inconsistent with section 27 and section 28 of the Constitution.

The second issue was whether or not section 305 of the Penal Code was contrary to or inconsistent with section 27, section 28 and section 77 of the Constitution.

The third issue was, regardless of the consistency or inconsistency with the Constitution, whether or not and the means by which it was expedient to revise laws.

After deliberations, the Constitutional Court found as follows. Section 27 and section 28 of the Constitution were provisions in Chapter 3 on rights and liberties of the People. Section 27 of the Constitution was a provision which recognised the rights and liberties of a person. Men and women were equal. Unfair discrimination against any person was prohibited. However, a measure prescribed by the state for eliminating obstacles or promoting a person's ability to exercise rights or liberties on par with other persons was not considered to be an unfair discrimination. Section 28 of the Constitution was a provision which recognised absolute rights and liberties in life and body of a person since life and body were attributes which accompanied a person from birth. The exercise of such rights and liberties had to be done with caution to avoid prejudicing the rights of other persons. Finally, section 77 was a provision in Chapter 6 on state policies. The provision stated that the state should enact laws only as necessary and repeal or revise laws which were no longer necessary or inconsistent with circumstances, or which constituted obstacles to ways of lives or engagement of occupations, without delay, to avoid causing a burden on the people. The state should also take actions to give convenient public access to provisions and to facilitate comprehension of the law to enable proper compliance.

The first issue was whether or not section 301 of the Penal Code was contrary to or inconsistent with section 27 and section 28 of the Constitution.

After deliberations, the Constitutional Court found that the Penal Code was a law intended to protect persons and preserve peace and order in society. The law stipulated actions or inactions which constituted wrongdoings as well as prescribed criminal penalties for wrongdoers. Section 301 was a provision in Part 2, Description 10, Chapter 3 on the offences of abortion. The provision stated that "any woman who causes an abortion on oneself, or consents to another person causing one's abortion, must be liable to a term of imprisonment not exceeding three years or a fine not exceeding sixty thousand baht, or both." Such provision was intended to protect the life of a fetus in a mother's womb by imposing penalties on a woman who caused an abortion on oneself or consented to another person causing one's abortion.

Termination of pregnancy presented a delicate problem with respected to the society, medicine and the law. The issue also raised problems concerning ethics

and morality. This action was deemed to be a criminal wrongdoing and penalties were imposed only on the woman causing an abortion on herself or consented to another person causing an abortion on herself. The offence of abortion embedded an intent and legal moral to protect the fetus, recognising the importance and value of human life pending birth. However, the roots of society were not dependent only upon the realisation of value of human life, but also on other important factors which comprised roots of society similar to the protection life of a fetus. If the only intent was to protect the fetus without consideration for the protection of the pregnant mother which pre-existed the fetus' rights, such an approach could prejudice the woman resulting in unfairness and encroachment or restriction of a woman's bodily rights to perform or omit an act on one's life and body, being a natural right fundamental to human dignity that was characteristic of one's rights and liberties, insofar that such action did not interfere or impinged upon the rights or liberties of another person. Such provision also affected the right of self-determination of a pregnant woman, which included the right of a woman to decide on the termination or continuance of a pregnancy. Moreover, the protection of a fetus' rights and the rights of a pregnant woman must be balanced by applying the stage of the pregnancy as a rule for denying a woman rather than setting conditions or suitable time limits as provided under section 301 of the Penal Code. Hence, this provision restricted rights or liberties of a woman in excess of necessity. In addition, the state had the duty to provide measures to promote the exercise of rights and liberties of a person by having in place measures for the safe and legal termination of pregnancy, without prejudice to the exercise of a woman's rights, whilst also providing care and safeguards for the life of a fetus without prejudice to the right to life. The provisions of section 301 of the Penal Code thus affected the rights and liberties in life and body of a woman in excess of necessity and was not consistent with the rule of proportionality, and restricted rights and liberties under section 28 of the Constitution.

As for the applicant's claim that section 301 of the Penal Code, which provided for only the woman to have criminal liability, excluding the man who had a relationship with the woman and participated in the commission of the wrongdoing, was an unfair discrimination contrary to or inconsistent with section 27 of the Constitution, the Constitutional Court found as follows. Section 27 of the Constitution recognised the equality of persons. Unfair discrimination against a person was prohibited. This principle of equality contained the fundamental principle, namely treatment of essentially identical objects equally and treatment of essentially different objects differently according the nature of that matter. An offence under section 301 of the Penal Code could only occur with a woman

because by nature only a woman could become pregnant and terminate a pregnancy. Since men and women have different physical attributes, applying the penalty and offence under section 301 of the Penal Code to a man who had a relationship with a woman constituting the cause for pregnancy to achieve equality and fairness would amount to the identical treatment of essentially different objects. This would be an unfair treatment of the man. Therefore, section 301 of the Penal Code was neither contrary to nor inconsistent with section 27 of the Constitution.

Hence, section 301 of the Penal Code was contrary to or inconsistent with section 28 of the Constitution. An enforcement provision is hereby provided for the ruling to come into effect after the expiration of three hundred and sixty days as from the day of Constitutional Court ruling under section 74 of the Organic Act on Procedures of the Constitutional Court B.E. 2561 (2018).

The second issue was whether or not section 305 of the Penal Code was contrary to or inconsistent with section 27, section 28 and section 77 of the Constitution.

After deliberations, the Constitutional Court found that the section 305 of the Penal Code was a provision in Part 2, Description 10, Chapter 3 on abortion offences, providing that “if an offence under section 301 and section 302 is committed by a medical doctor and (1) is necessary due to the health of the woman, or (2) a woman became pregnant due to the commission of a criminal offence under section 276, section 277, section 282, section 283 or section 284, the person acting as such does not have criminal liability.” The provision provided for exemptions from criminal liability for medical doctors performing an abortion procedure in 2 cases, i.e. where it was necessary with regard to the woman’s health, or where the woman became pregnant due to the commission of a criminal offence under section 276, section 277, section 282, section 283 or section 284 of the Penal Code. In such cases, a medical doctor did not have criminal liability if the legal prerequisites were met.

On the applicant’s claim that section 305 of the Penal Code provided reasons for termination of pregnancy in only 2 cases, despite the fact that a pregnant woman should have the right to decide on whether to continue with the pregnancy or terminate the pregnancy, being the right of self-autonomy within the pregnant woman’s human dignity, and was an unfair discrimination and a restriction of rights and liberties in life and body of a pregnant woman, being therefore contrary to or inconsistent with section 27 and section 28 of the Constitution, the Constitutional Court found as follows. Such provision provided for exemptions from criminal liability for a woman who caused an abortion on herself and a medical doctor who caused an abortion of a woman’s pregnancy, which were offences under section 301 and section 302 of the Penal Code in order to protect a pregnant woman in a case of

necessity due to the woman's health or due to a woman becoming pregnant due to the commission of a criminal offence under section 276, section 277, section 282, section 283 or section 284 of the Penal Code. Regard had been given to the rights in life and body of a woman, as well as the right of self-autonomy with regard to one's reproductive health. In the interest of safety of a woman's life, which could be in danger as a consequence of the termination of pregnancy, the state therefore provided that a termination of pregnancy had to be performed under the supervision of a medical doctor, which was also intended to avoid health problems and consequential social problems that could affect public interests. Medical Council Regulation on Practice Directions Pertaining to Termination of Pregnancies under Section 305 of the Penal Code B.E. 2548 (2005) provided as a prerequisite for exemption that a medical doctor could perform a termination of pregnancy under section 305 of the Penal Code with the consent of the pregnant woman and the procedure had to be performed by a licensed medical practitioner as provided by law. Furthermore, the procedure had to be performed in a medical establishment and done in accordance with the prescribed conditions, i.e. a termination of pregnancy under section 305(1) of the Penal Code was necessary due to the physical or mental health of the pregnant woman as certified or advised by at least one other licensed medical practitioner who was not the person performing the termination of pregnancy. The mental health problem of a pregnant woman included severe depression due to discovery of the presence or high risk of a serious disability in the fetus, or presence or high risk of a serious genetic disorder. Such woman must receive a diagnosis and advice as per genetic science, certified by the signature of at least one licensed medical practitioner. The diagnosis must show a clear medical indication that the woman had a physical or mental health problem and the examination and diagnosis must be recorded in the medical records as evidence. As for a termination of pregnancy under section 305(2) of the Penal Code, there had to be credible evidence or facts that a woman became pregnant due to the commission of a criminal offence. From such provisions of section 305 of the Penal Code and Regulations, there was clarity in termination of pregnancies performed by medical practitioners and already included cases on physical and mental health problems of pregnant women. It was therefore discernible that section 305 of the Penal Code was a provision which was intended to protect both the equity of law and the fair protection of rights and liberties in the body of a pregnant woman. The provision was in accordance with the rule of proportionality and was intended to provide suitable safeguards for the interests of society and the public. There was no unfair discrimination and no instance which could constitute a restriction of right or

liberty in the body of a pregnant woman pursuant to section 27 and section 28 of the Constitution.

As for the applicant's claim that section 305 of the Penal Code was outdated under the circumstances and current medical advancements which emphasized medicinal abortions rather than surgical abortions, and that the provision failed to extend protection to other medical personnel who provided services under the supervision of a medical practitioner, and therefore, was inconsistent with section 77 of the Constitution, the Constitutional Court found as follows. One objective of section 305 of the Penal Code was to protect the life and body of a pregnant woman from a termination of pregnancy. In order to achieve this objective, it was required that a medical doctor who was a licensed medical practitioner under the law would be the person performing the termination of pregnancy. A termination of pregnancy was a delicate topic with regard to social ethics and affected the peace and order and good morals of the people. Section 77 of the Constitution was a provision in the chapter on directives on state policies, which the state should apply as a guideline for enacting laws only to the extent of necessity and should repeal or revise laws which were no longer necessary or inconsistent with circumstances. This provision did not provide a duty of the state which mandated strict compliance. The provision merely provided a policy directive to be observed by the state as a guideline for enacting laws. Thus, this was not a case where section 305 of the Penal Code could be contrary to or inconsistent with section 77 of the Constitution.

Therefore, section 305 of the Penal Code was neither contrary to nor inconsistent with section 27, section 28 and section 77 of the Constitution.

The third issue was whether or not and in what ways, regardless of the consistency or inconsistency with the Constitution, there should be a measure for review of legislation.

After deliberations, the Constitutional Court found as follows. The provisions of the Penal Code governing this issue had been in force for 60 years, causing problems of illegal abortions in society resulting in harm to the lives and bodies of a large number of women. The provision had also caused social problems due to the unpreparedness of women and numerous children born. Current medical sciences had greatly advanced, enabling care to safely support a woman's decision with regard to her body at the appropriate time. In addition, there was a lack of comprehensive and appropriate protective measure for medical practitioners. The Constitutional Court therefore proposes that the Penal Code and laws relating to abortion should be revised in line with current circumstances. The relevant agencies should take actions to revise such provisions of law.

By virtue of the foregoing reasons, the Constitutional Court held that section 301 of the Penal Code was contrary to or inconsistent with section 28 of the Constitution, but was neither contrary to nor inconsistent with section 27 of the Constitution. The Constitutional Court hereby prescribes an enforcement provision in the court ruling in relation to the contrary or inconsistent provision, which shall come into effect upon the expiration of three hundred and sixty days as from the date of court ruling. Section 305 of the Penal Code, on the other hand, was neither contrary to nor inconsistent with section 27, section 28 and section 77 of the Constitution. Furthermore, it is expedient that a relevant agency shall proceed to revise the Penal Code and laws governing abortions in line with current circumstances.
