

Summary of the Constitutional Court Ruling No. 21/2546

Dated 5th June B.E. 2546 (2003)*

Re : The Ombudsman requested for a Constitutional Court ruling under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), in the case where section 12 of the Names of Persons Act, B.E. 2505 (1962), raised the question of constitutionality.

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1. Background and summarized facts

The Ombudsman (applicant) submitted an application together with an opinion, dated 26th July B.E. 2544 (2001), requesting the Constitutional Court for a ruling under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), on whether or not section 12 of the Names of Persons Act, B.E. 2505 (1962), raised the question of being unconstitutional under section 30 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court accepted the application for further proceedings and requested the Minister of Interior, in his capacity as the Minister in charge and control of the Act, submitted a statement. The statement submitted by the Minister of Interior could be summarized as follows. There were pros and cons in the case of allowing married women to choose between their maiden names or the surnames of their spouses. The pros were: (1) families with only daughters could maintain their surnames; (2) an opportunity was given to women who did not wish to use their husbands' surnames because the husband was a foreigner or because their surnames were well-known to the general public to be able to use their own surnames; and (3) it was an indication that women enjoyed equal rights to men as provided under the Constitution. On the other hand, the cons were: (1) it was unknown as to whether an offspring would adopt the surname of his/her father or mother and there was a possibility of siblings in the same family adopting different surnames; (2) identification of an individual would be made more difficult because a person could switch between two surnames; and (3) such a proposal was beneficial only to selected groups of persons and not founded on fundamental principles as well as the commonly virtuous tradition of the society. The Ministry of Interior considered that the Names of Persons Act, B.E. 2505 (1962), was a practice which took into account the culture and way of living of the Thai people and that it was a legal measure which enhanced the strength of the family unit. The equal rights between men and women were viewed more as rights pertaining to society and politics.

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2. The issues considered by the Constitutional Court

(1) The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the power to accept the Ombudsman's application as well as his opinion for consideration under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held the following opinion. According to the application, provisions of law, namely section 12 of the Names of Persons Act, B.E. 2505 (1962), raised the question of constitutionality. The matter was therefore within the powers of the Constitutional Court to accept the Ombudsman's application as well as his opinion on such matter for consideration under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

(2) The issue considered by the Constitutional Court according to the application was whether or not section 12 of the Names of Persons Act, B.E. 2505 (1962), raised a question of constitutionality under section 30 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The point to be considered was whether the wording in section 12 of the Names of Persons Act, B.E. 2505 (1962), bore a meaning which made it mandatory for married women to use their husbands' surnames only, or it granted married women with the right to use their husbands' surnames. The Constitutional Court held that the crucial words of section 12 were "shall use", which expressly bore the characteristics of a mandatory provision. By analogy with the wording in section 6 of the Surnames Act, B.E. 2456 (1913), it could be seen that there was a difference in the two uses of words. In other words, section 6 employed the words "...and is able to use one's previous name and previous surname", which clearly indicated the intention that women retained the right to use their maiden names after marriage. The Names of Persons Act, B.E. 2484 (1941), and the Names of Persons Act, B.E. 2505 (1962), altered such principle. The parallel provisions had been altered to mandatory provisions. Thus, it followed that the Names of Persons Act, B.E. 2505 (1962), intended to abrogate married women's rights to use their maiden names. The previous principle of allowing married women to use their maiden names was altered to a compulsion that married women should use only their husbands' surnames.

Once it had been determined that the provisions of section 12 had the characteristics of a mandatory provision for married women to use their husbands' surnames only, which was an encroachment of the rights to use of surnames of married women resulting in an inequality in rights as between men and women, it followed that the provision created inequality under the law due to differences in sex and personal status. The case was also an unjust discrimination because married women were one-sidedly compelled to use their husbands' surnames on the grounds of marriage, and not on the grounds of differences in physical attributes or obligations between men and women arising from the difference in sex such that discrimination was necessary.

As for the argument of harmony and peace within the family as well as consistency with the custom and way of living of the Thai people, the Constitutional Court held that such arguments could not be upheld. It was viewed that harmony and peace within the family arose from an understanding, acceptance and mutual respect between husband and wife. The first law on surnames in Thailand was enacted in the year B.E. 2456 (1913) when previously Thailand had not witnessed a surname system. Such matters therefore tended not to relate to the longstanding custom and way of living. Moreover, the grant of a right to married women to use maiden names only served to promote the equal enjoyment of rights under the law by men and women.

3. Ruling of the Constitutional Court

The Constitutional Court held that section 12 of the Names of Persons Act, B.E. 2505 (1962), was unconstitutional by reason of being contrary to or inconsistent with section 30 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The provision was therefore unenforceable according section 6 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
