

# Summary of the Constitutional Court Ruling No. 30/2548

**Dated 1<sup>st</sup> February B.E. 2548 (2005)**

**Re: The President of the Senate referred the opinion of senators to the Constitutional Court for a ruling under section 262 paragraph one subparagraph (1) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), in the case of whether or not section 38 paragraph one of the CD Products Bill B.E. .... was contrary to or inconsistent with section 29, section 32 and section 48 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).**

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## **1. Background and summarized facts**

The President of the Senate referred the opinion of 77 senators to the Constitutional Court for a ruling under section 262 paragraph one subparagraph (1) on whether or not section 38 paragraph one of the CD Products Bill B.E. .... was contrary to or inconsistent with the Constitution. The reference could be summarized as follows. The Bill required notification of production, a record of certificate in the product and supervisory inspection of production by a competent official. With respect to the enforcement provisions, senators were of the opinion that the confiscation penalty provided in section 38 paragraph one that “a person who fails to comply with or violates section 5 paragraph one, section 7 paragraph one or paragraph two, section 11, section 13, section 15, section 16 or section 17 shall be subject to confiscation of the implicated machines by court order” did not apply the principles of confiscation under the Penal Code, but those provisions were special measures which applied exclusively to offences under this Bill. For this reason, it was considered that the Bill contained substance which was inconsistent with the guarantee of the people’s fundamental rights and liberties recognized by the Constitution. Section 38 paragraph one of the CD Products Bill B.E. .... was therefore contrary to or inconsistent with section 29, section 32 and section 48 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

## **2. Preliminary issues**

The preliminary issue considered by the Constitutional Court was whether or not the application submitted under the President of the Senate’s reference of senators’ opinion to the Constitutional Court for a ruling that section 38 paragraph one of the CD Products Bill

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B.E. .... contained provisions which were contrary to or inconsistent with section 29, section 32 and section 48 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), was in accordance with section 262 paragraph one subparagraph (1) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. The President of the Senate made this reference of the opinion of 77 senators to the Constitutional Court after the approval of the CD Products Bill B.E. .... by the National Assembly and prior to the submission of the Bill to the King for royal signature under section 93. At the time the reference was made, there were 453 members of the House of Representatives and 200 senators, a total of 653 members. Therefore, 77 senators constituted not less than one tenth of the total number of existing members of both Houses of the National Assembly. The President of the Senate's application was thus in accordance with section 262 paragraph one subparagraph (1) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The Constitutional Court had the power to accept this application for consideration.

### **3. The issues considered by the Constitutional Court**

The issues which had to be considered by the Constitutional Court were whether or not section 38 paragraph one of the CD Products Bill B.E. ...., which provided that "a person who fails to comply with or violates section 5 paragraph one, section 7 paragraph one or paragraph two, section 11, section 13, section 15, section 16 or section 17 shall be subject to confiscation of the implicated machines by court order," was contrary to or inconsistent with section 29, section 32 and section 48 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held as follows. Section 38 paragraph one of the CD Products Bill B.E. .... provided that a Court may order the confiscation of machines in the following cases: failure to notify a competent official of a use of machines for the production of CD's under section 5 paragraph one, failure to give notice of the place of production and relocation of place of production under section 7 paragraph one or paragraph two, failure to affix and display a product certificate and an original copy certificate under section 11, use of a product certificate and original copy certificate under section 13, counterfeiting or imitating a product certificate or original copy certificate under section 15, failure to give notice of acquisition or possession of machines under section 16, or failure to give notice of distribution, disposal or transfer of machines or loss of possession of machines under section 17. These provisions were a part of measures to prevent and combat copyright infringement. Confiscation of property was one type of penalty under section 18 of the Penal Code, which could be divided into three instances, namely, (1) property which must be confiscated by the Court regardless of the owner's identity under section 32, (2) property which the court must confiscate unless the property was owned by another person who did not connive at the commission of the offence under section 34, and (3) property which the Court had a discretion as to whether or not it should confiscate unless the property was owned by another

person who did not connive at the commission of the offence under section 33. It was apparent that the purpose behind property confiscation under the Penal Code was to penalize the offender or the possession of property which constituted an offence. In the case of section 38 paragraph one of the CD Products Bill B.E. ...., a machine used for the production of CD's was not a property whose manufacture or possession constituted an offence per se. In the confiscation of machines used for the production of CDs when there was a failure to notify a competent official of the initiation of production, failure to give notice of the place of production or relocation of place of production, failure to make and display a product certificate or an original copy certificate, failure to use a product certificate, failure to give notice of acquisition or possession of machines, failure to give notice of a distribution, disposal or transfer of machines, the Court had to issue a confiscation order for such machines without any discretion. No regard was given to whether or not the owner of such machines connived at the commission of the offence, nor was the owner of the machines given an opportunity to prove whether or not he/she connived at the commission of the offence. The confiscation under such provision was absolute. No considerations were given to the offence or the suitability of penalties. The measures imposed on the owner of properties were severe and amounted to a restriction of a person's rights in property that was disproportional to necessity and affected the essential substance of a person's rights in property.

The Constitutional Court, by majority vote, therefore held that section 38 paragraph one of the CD Products Bill B.E. .... was contrary to or inconsistent with section 29, section 32 and section 48 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court, by majority vote, further held that the provisions of section 38 paragraph one of the CD Products Bill B.E. .... which was contrary to or inconsistent with the Constitution was not of essence to the Bill. Therefore, the Bill did not lapse under section 262 paragraph three of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Only those provisions that were contrary to or inconsistent with the Constitution lapsed under section 262 paragraph four. Once it was held that section 38 paragraph one of the Bill lapsed, the provisions of section 38 paragraph two which stated that "the machines confiscated by court order shall be employed in official use or distributed to a government agency or state enterprise or destroyed under rules, procedures and conditions prescribed by notification of the Minister" were provisions concerning proceedings to be taken on the machines confiscated by court order under section 38 paragraph one. Hence, section 38 paragraph two also lapsed accordingly.

#### **4. Ruling of the Constitutional Court**

By virtue of the above reasons, the Constitutional Court held that section 38 of the CD Products Bill B.E. .... lapsed.

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