



**វិទ្យាស្ថានសភាកម្ពុជា**  
PARLIAMENTARY INSTITUTE OF CAMBODIA

# BRIEFING NOTE

The Senate Commission 6

## **Relationship between the Ministry of Justice and the Judicial System in Thailand**

August 2017

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## I. Introduction

Independence of the judicial system is very important for the rule of law[1]. There are two main characteristics of judicial independence[1]. The first characteristic is non-partisanship[1]. This means that the judicial system does not favor one party over the other; it provides justice in accordance with facts and evidence. The second is that judges make decisions without pressure or interference from people inside or outside the judicial system[1]. However, ensuring judicial independence in practice is not easy as there are several challenges, including political interference, budget dependence, and influence amongst the judges on each other.

In Thailand, the judicial system has been reformed and is constitutionally separated from the government. The objectives of the judicial reform were to contribute to institutional independence by promoting an accountable, accessible, and effective judiciary. Additionally, the reforms introduced Alternative Dispute Resolution (ADR) mechanisms, which is a good method to settle disputes outside the court system.

Since 2014, the military has been in control of the government and has conducted reforms and reconstructed the constitution[2]. According to Article 277 and 279 of the interim constitution of 2016, the judicial system shall be considered constitutional, lawful and will continue to be in force under the 2016 Constitution[3]. Based on the existing documents, this briefing note addresses two main research questions:

1. How independent is the judiciary in Thailand from the Ministry of Justice?
2. How does Thailand implement alternative dispute resolution?

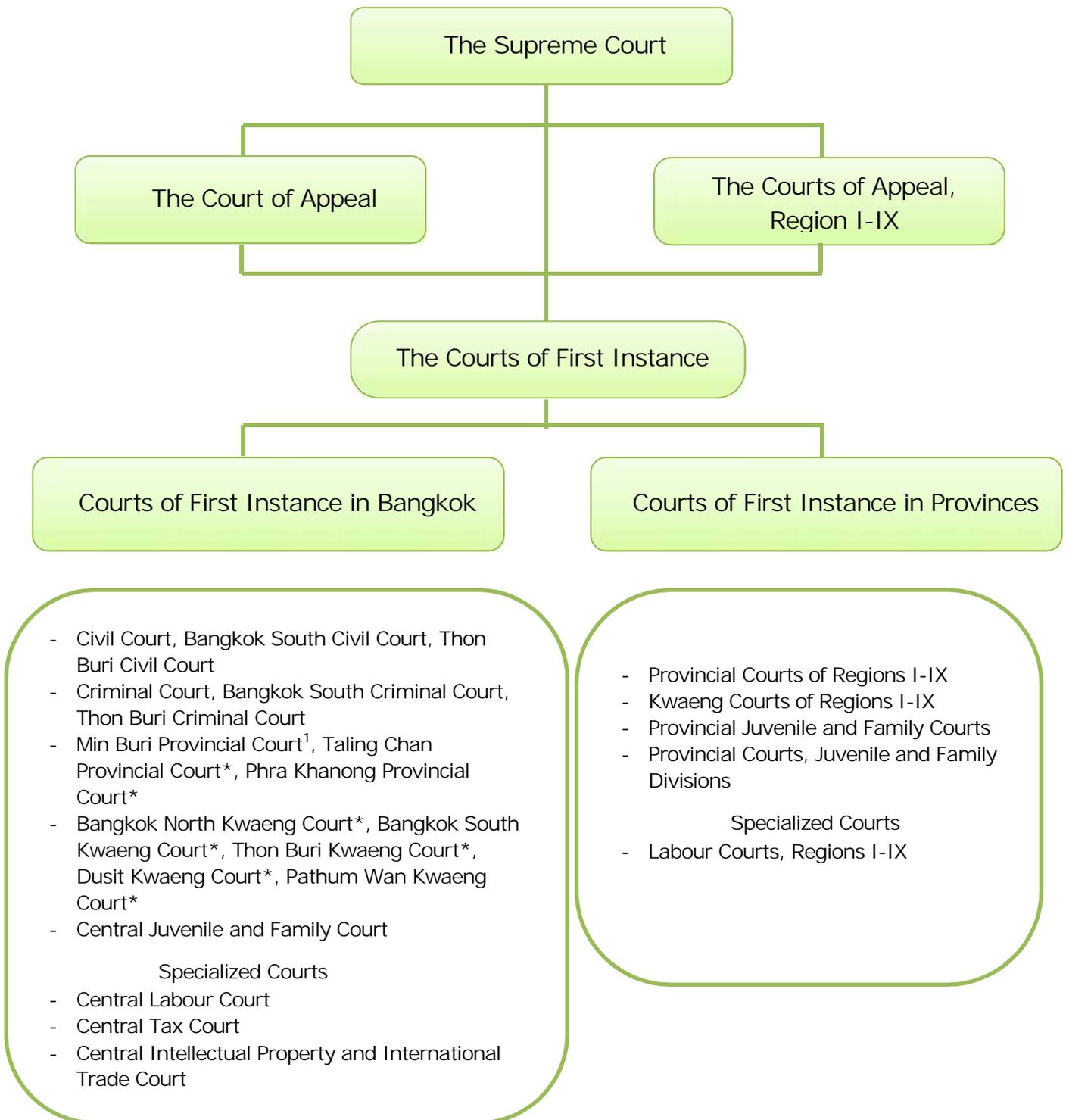
## II. Judicial System in Thailand

Thailand has a civil law system. In the context of Thailand, the code of law follows the model of France, Germany, and Japan, and has been influenced by its own traditional and customary laws[4]. In addition, most of the content of the laws is derived from laws of other countries, which includes influences from common law countries like Great Britain[4].

The judicial system of Thailand consists of three levels of courts (Figure1 below), collectively known as the Courts of Justice[5]. The Supreme Court is the highest court, the level below that is the Courts of Appeal and the bottom level are the Courts of First Instance [4]. Beside the Courts of Justice, there are three different types of Courts: the Administrative Court[6], the Constitutional Court[7], and the Military Court. Additionally, there also a number of specialized courts that deal with

specific issues including the Central Labor Court, the Central Tax Court, the Central Intellectual Property and International Trade Court, and the Central Bankruptcy Court (see Figure1 below)[5]. The Courts of Appeal consists of the Court of Appeal and nine Regional Courts of Appeal[5]. The Regional Courts of Appeal are located in difference regions of the country.

Figure 1: Organization Chart of the Courts of Justice[8]



### III. Basic Principles of Judicial Independence

Since the judicial system is chiefly responsible for providing justice and protecting human rights, its independence is important. The United Nations General Assembly established the Basic Principles on the Independence of the Judiciary in 1985[9]. These principles can be used as a model for every country to adopt in their constitutions[9]. However, this principle may not be fully implemented in every situation.[10]

In order to measure the independence of the judicial system, some criteria were established by the United Nations which can be summarized into four components as follows:

- Conditions to be guaranteed: Normally, the constitution of each country enshrines the separation of power of the three branches – the executive, the legislature, and the judiciary. Thus, each branch's power, particularly the judiciary's, is guaranteed to be independent by the constitution. This is to ensure that its roles and duties are not under the influence of external actors.
- Decisions and authority: The judiciary has the power and authority to make decisions on each case independently; their final decisions are not to be changed by an outside entity.
- Budget independence: this is an important factor which ensures that the judiciary has sufficient budgetary resources to perform its roles and duties effectively. If the judicial branch does not have autonomy over its budget, the other branches might interfere with its decision making process.
- Judges' qualifications: The selection of judges shall depend on their capabilities and qualifications. If the government is the one who appoints the judges, the constitution or some specific laws should guarantee transparency and set clear criteria for the appointment. This would ensure that judges have the ability to carry out their roles and duties and make decisions effectively.

#### Thailand: Judicial Independence[3, 11, 12]

Thailand was a democratic country that respected the principle of the separation of powers[3]. However, since the military Junta has fully controlled this country since May 2014, the power of the judiciary has been reduced. Despite this fact, the doctrine of separation of powers is vital for the independence of the judiciary in order to maintain a system of "checks and balances" between the three powers [13]. It is essential that decisions of judges are not interfered with by other persons or organizations and that no pressure is put on the judiciary by the government or the parliament[14]. The Basic Principles on the Independence of the Judiciary[14] are applied to examine judicial independence in Thailand .

The following sections address the judicial independence of the Courts of Justice of Thailand. The principles of judicial independence can be separated into two characteristics: institutional independence and independence of individual judges[14].

#### a. Institutional Independence

Institutional independence reflects the principle of separation of powers that is ideally enshrined in a constitutional structure. Seeing the importance of judicial independence, administrative personnel and the budget of the judiciary shall be independent to minimize legislative and executive control over court operations and administration[15]. The judiciary should be independent and free from influences from external parties including the executive and legislative power.

The Thai Constitution divided power into three branches; the Executive branch, the Legislative branch, and the Judicial branch[3]. In 1892, the Ministry of Justice was established and all courts were under the control of the Ministry of Justice [3]. The Ministry of Justice was reformed in 1991 and while other government agencies<sup>a</sup> were placed under the Ministry of Justice, all courts except the Military Court are independent from the Ministry of Justice[3]. Furthermore, Article 193 of the Constitution of 2016 states that the judiciary is administratively independent from the Ministry of Justice, including in its administrative personnel and budget, except for the Military Court[3]. According to the Act of Judicial Administration of the Courts of Justice, Article 32, "the office of the Judiciary shall propose its expenditure budget to the Cabinet for allocating financial support to the Courts of Justice and the Office of the Judiciary"[12]. The objective of separating the judiciary from the Ministry is to enable it to function efficiently, accountability, transparently and independently.

In the Courts of Justice, judge-trainees have to pass an examination held by the Judicial Commission before being appointed by the President of the Supreme Court, according to the Act of Judicial Service, Article 14 and Article 26[11]. Therefore, Judges in the Court of Justice are appointed only by the Judicial Commission[11]. Based on the above law, no one in the executive or legislative branch is directly involved in the appointment of judges. As a result, the process of judicial appointments seems to be independent of the political powers, and all judges can be confident in fulfilling their functions.

The Judicial Commission guarantees the protection of judges in carrying out their functions and duties. Moreover, the constitution provides that the transfer of a judge without his or her prior consent is not permitted, except in the case of a transfer

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<sup>a</sup> The agency under the Ministry of Justice including the Department of Probation, Department of Juvenile Observation and Protection, Office of Justice Affairs, Office of the Permanent Secretary, Legal Execution Department, the Department of Special Investigation, Central Institute of Forensic Science (CIFS), Corrections, Rights and Liberties Protection Department, Ministry Office.

provided by law including being promoted to a higher position, receiving a disciplinary action or being accused of committing criminal offenses[11]. There are five types of disciplinary punishment: expulsion, dismissal, discharge, suspension from promotion or salary increase, and reprimand[11].

### b. The Independence of Individual Judges

It is important to note the difference between the independence enjoyed by judges in their individual decisions and judicial independence from the other branches of power [15]. In Thailand, the law guarantees institutional judicial independence. However it does not ensure independence of judges in terms of decision making[15]. In general, higher-level judges of the Courts of Justice have influence on lower-level judges, especially in relation to decision making. Thus, lower level judges might feel pressured to make decisions favoured by higher-level judges[15]. Lower level judges who are vulnerable to this type of influence are expected to be promoted and recommended for qualifications[15]. This may affect decisional independence. However, judges of the Courts of Justice are appointed by the Judicial Commission through a process of competitive examination [11].

To ensure judicial independence, the Judicial Commission has been established to oversee the appointment, promotion, and disciplining of judges [11]. The Judicial Commission is chaired by the President of the Supreme Court and consists of twelve qualified judges that represent every level in the court system (four judges from the Supreme Court, four judges from the Court of Appeal/Regional Courts of Appeal and the last four from the Court of First Instance) as well as two commissioners from the Senate. This commission was created to guarantee the independence of judges [11].

Figure 2: Judicial Independence in Thailand[16]

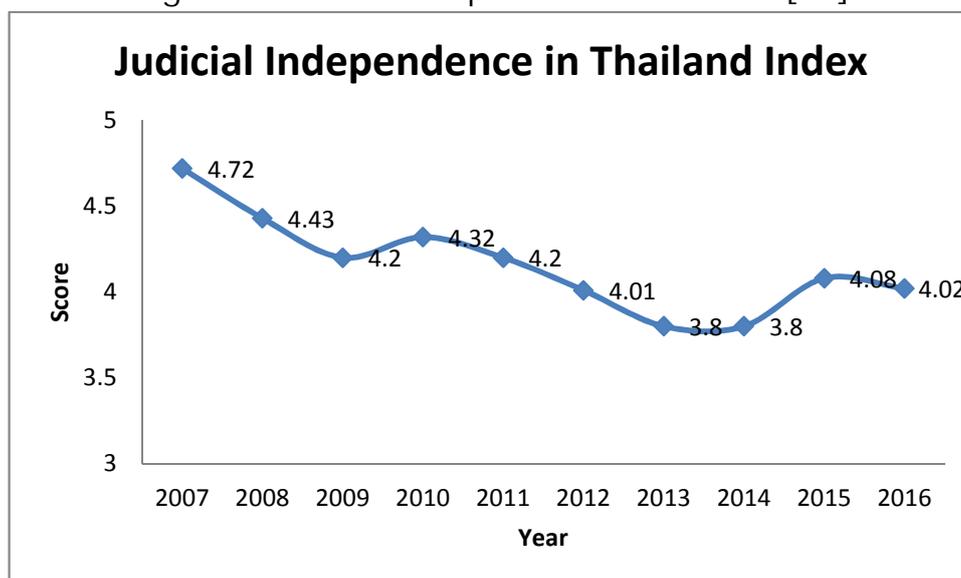


Figure 2 indicates the judicial independence in Thailand from members of the government; organizations, or people from 2007 to 2016 (Score 1: heavily influenced; Score 7: entirely independent). During the decade the score of judicial independence in Thailand was gradually decreased from 4.72 in 2007 to 4.02 in 2016. In early 2014, the military had taken control the country, and judicial independence was decreased to 3.80. However, in 2016 the score for judicial independence gradually increased to 4.02.

#### IV. Alternative Dispute Resolution

Litigation is an approach to deal with both public and private disputes. Due to the increase of disputes in Thailand, the judiciary finds it hard to cope with all the disputes effectively, leading to longer times to reach the conclusion of some cases[17].

In response to this issue, Alternative Dispute Resolution (ADR) was implemented in Thailand twenty years ago[18]. ADR plays a significant role in the legal system of Thailand. The Royal Government of Thailand has encouraged Thai citizens to use this type of resolution before bringing the case to the courts, so that the disputants can save time and expense. To ensure the implementation of ADR, the Alternative Dispute Resolution Office has been established under the control of the Office of the Judiciary[17].

There are two types of ADR: arbitration and mediation. Arbitration and mediation include in-court and out-of-court procedures[19].

##### 4.1. Mediation

While mediation has long been used in Thailand, it has often only been used in small conflicts. The Civil Procedure Code (CPC), which was first adopted in 1935, provides that mediation can be required by the trial judge or can be done through the agreement between of the two parties involved[19]. In order to help reduce the expenses of the two parties, the Office of the Judiciary finances the mediation process[17].

With regards to in-court mediation, the trial judge will always advise the disputants to try mediation before taking the proceedings any further [19]. The proceedings can be stopped at any time when the disputing parties decide to resolve the problems through the use of mediation and they can use an in-court mediator – appointed by the court – or an out-of court mediator[19].

Instead of going to court, the disputants can find out-of-court mediation services at the Mediation Center in the Alternative Dispute Resolution Center, the Office of the Judiciary, Ministry of Justice, the THAC Mediation Center, and the Lawyers Council

of Thailand[19]. The mediator helps to find a suitable solution for both parties. The parties can then negotiate based on the solution provided by the mediator, which ideally leads to the disputing parties reaching an agreement at the end of the mediation process. If an agreement cannot be reached, either party can bring the case to court[17].

## 4.2. Arbitration

Contrary to mediation, arbitration has been used in serious and highly valued business disputes. Furthermore, the parties have to spend a considerable amount of money on both an arbiter and on the institution that provides the arbitration services. The Royal Government of Thailand has established the UNCITRAL Model Law on International Commercial Arbitration as a specific mechanism to apply the international arbitration framework to domestic (i.e., disputes within Thailand) disputes. In the arbitration process, the disputants can design their own negotiation procedures to ensure that each party's suggestions can be heard by the other party[17].

The court acts as an important actor in enforcing the implementation of the agreement resulting from the arbitration process – both in-court and out-of-court. If either party does not agree with any provision in the agreement, the court has the authority to assign an arbiter to mitigate and find a solution that is suitable for both parties[17].

Apart from the use of arbitration in business conflicts, many governmental agencies such as the Department of Insurance, the Department of Intellectual Property, and the Security and Exchange Commission, have also been using this arbitration process[17].

Out-of court arbitration services can be found at the Thai Arbitration Institute (TAI), the THAC Arbitration Center (THAC), the Office of Insurance Commission (OIC), the Stock Exchange of Thailand (SET), and the International Chamber of Commerce (ICC Rules). Arbitration outside of court falls under the 2002 Arbitration Act. The average timeframe for out-of-court arbitration is approximately one year, and the cost depends on the venue and the procedures used. For example, the cost of resolving one dispute arbitrated at the Thai Arbitration Institute, might be below THB (Thai Bath) 2 million (approximately 60,000 USD), of which the fee of the arbitrator is approximately THB 30,000 (approximately 900 USD)[17]. The rest of the money goes to the Arbitration Institution.

There are two forms of out-of-court arbitration: ad hoc arbitration and institutional arbitration. Ad hoc arbitration does not cost much since the parties control all the proceedings by themselves and can always discuss the fee with the arbitrator. In the

case of institutional arbitration, parties have to spend more money because they have to follow the regulations and procedures of the institution they use for the arbitration [17].

## V. Conclusion

In Thailand, there was a major reform of the court system when the 1997 Constitution was implemented. This reform separated courts from the Ministry of Justice, in accordance with the key doctrine of judicial independence, in particular, autonomy from the executive branch. Furthermore, the Judicial Commission plays a key role to monitor the judicial administration of the Courts of Justice and to ensure internal rules of appointment, promotion, and disciplining of judges are followed. Both institutional and individual independence of judges are guaranteed by the constitution and laws. Apart from court resolutions, Alternative Dispute Resolution (ADR) is a means in Thailand to settle disputes related to civil, family, business, and trade disputes. ADR is based on agreement of both parties and if both parties are not happy with the final decision they can go to court for a final decision.

# Annex

## I. National Assembly of Thailand

The Parliament of Thailand is bicameral, composed of the House of Representatives (the Lower House) and the Senate (the Upper House), according to Section 79 of the Constitution 2017. Furthermore, under Section 83 of the Constitution 2017, the number of members of the House of Representatives is five hundred who are elected based on constituency and party-lists of the political parties. The Constitution requires that the House of Representatives are popularly elected, including: (1) three hundred and fifty members who are directly elected base on constituency, and (2) one hundred and fifty members on the party-list who are elected indirectly by the percentage of the vote. The members of the Senate consist of two hundred persons. The Senators are selected from persons who have knowledge, expertise, and a professional background and experience. The selection shall be made by Royal Decree, according to Section 107 of the Constitution 2017.

In May 2014, there was a take over by the Military in Thailand. At that time, the Military dissolved the Parliament and established the National Legislative Assembly (NLA) under the Constitution 2014 to substitute for the National Assembly of Thailand (NAT) – House of Representatives and the Senate<sup>b</sup>. The NLA is under the control of the National Council for Peace and Order. Until 2017, the Constitution Drafting Committee established the interim Constitution 2017. Under this constitution, the NAT has to be rebuilt after an upcoming national election (the date of this election is yet to be determined). Thus, the NLA is still operating in Thailand<sup>c</sup>.

## II. Legislative Process in Thailand

This legislative process is based on the Constitution of 2007 and interim Constitution 2017 because now there is no Senate and National Assembly because the National Legislative Assembly is performing as the Parliament of Thailand.

According to Section 142 of Thailand's Constitution of 2007, the persons or agencies that can propose or draft bills include (1) Council of Ministers, (2) more than 20 members of the House of Representatives, (3) courts or legal agencies, and (4) more than 10,000 citizens who are eligible to vote. In the case of a proposed or draft bill that is from members of the House of Representatives, courts, or the citizens and is related to finance, the Prime Minister decides whether to support that bill or not. The same section indicates that all the bills must be first reviewed by the House of Representatives.

A bill is considered to be a financial bill and if it is related to one of these characteristics: (1) taxes; (2) state budgets; (3) state assets; and (4)

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<sup>b</sup> National Legislative Assembly. 2017. History of the National Legislative Assembly. <http://w3c.senate.go.th/main.php?url=content&id=513> [Access on 23 August 2017].

<sup>c</sup> National Council for Peace and Order. 2017.

currency. If there is a doubt as to whether a bill is a financial bill which requires the Prime Minister's decision, the President of the House of Representatives and the presidents of all standing committees jointly decides whether it is a financial bill in a joint sitting within 15 days. The majority vote decides. In case there is a tied vote, the House of the Representatives' President shall vote to break the tie (section 143 of the constitution).

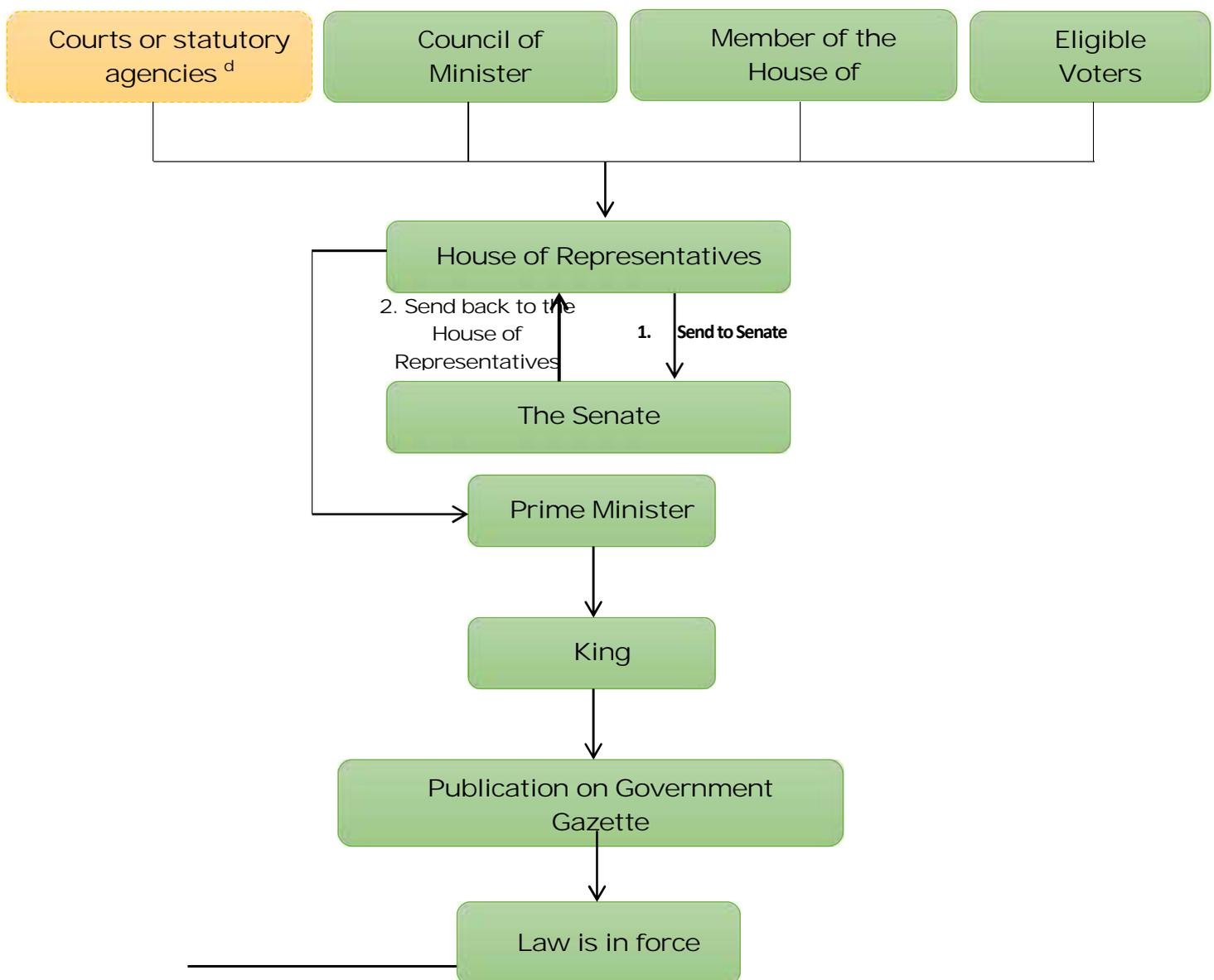
According to Section 146 of the Constitution 2007, after the House of Representatives vote for a proposed or draft bill, the bill shall be submitted to the Senate. The Senate shall review the bill within 60 days, and within 30 days for financial bills. However, the Senate can lengthen the period of time by not more than 30 days but only in certain cases. The bill is considered to be approved by the Senate in cases where the Senate fails to make a decision within the allotted time .

In accordance with Sections 147 and 150 of the Constitution 2007, further steps in the legislative process are as follows:

1. If the Senate approves the bill, the bill is to be sent back to the House of Representatives and then to the Prime Minister. Within a period of 20 days, the Prime Minister shall submit the bill for the King's signature. After the King has signed the bill, it is published in the Government Gazette in order for it to come into force.
2. In cases where the Senate makes amendments to the bill, the process will be as the same as in step 1 if the House of Representatives approves the amendment (s).
3. If the Senate disapproves the bill, it is sent back to the House of the Representatives for reconsideration.
4. In cases of step 3 and the House of Representative's disapproves amendments by the Senate, a Joint Committee shall be established with equal members from both Houses as determined by the House of Representatives. The Joint Committee will review the bill, make a report and submit it to the House of Representatives and the Senate. The Joint Committee has the power to call the relevant persons for more information- facts and evidence- regarding the bill. If the bill is approved by both houses, the process will be the same as in step 1. If both the Senate and the House of Representatives do not approve the bill, the bill shall be withheld.
5. According to Section 148, the withheld bill will be reconsidered within 180 days. In case where the House of the Representatives still approves the bill or the majority of the Joint Committee supports the bill, the process is the same as mentioned in step 1.
6. Before organic bills are submitted to the King for signature, the Prime Minister sends a copy to the Constitutional Court in order to make sure it is consistent with the Constitution (Section 141 of the Constitution 2007).

There is only a small difference between the Constitution 2007 and the interim Constitution 2017 (See Figure 1 below). The difference concerns the persons who can propose or draft bills. According to Section 133 of the Constitution 2017; the Council of Minister, the House of Representatives' Members of more than 20 persons, and the citizens eligible to vote of more than 10,000 persons are those that can propose bills. With regard to an organic bill, only the Council of Minister<sup>d</sup> and the House of Representatives' Members can propose this kind of bill to the National Assembly according to Section 131 of the Constitution 2017. The Constitution 2007, allowed the courts or legal agencies to propose bills with regard to their duties and tasks. The Constitution 2017 does not allow for this. Apart from this difference, all the legislative processes are the same for the Constitutions 2007 and 2017.

Figure 1: Legislative Process in Thailand



<sup>d</sup> The Council of Minister proposes organic laws upon the recommendation of the Supreme Court, or the Constitutional Court.

<sup>d</sup> It was enshrined in Section 142, Thailand's Constitution of 2007.

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