

**Nagoya University Center for Asian Legal Exchange (CALE)
and Graduate School of Law (GSL)**

Workshop Series on Constitutionalism in Asia and Beyond

Judicial Independence in ASEAN:

A Comparative Perspective

- 1) **Andrew HARDING** (Professor of Law, National University of Singapore)

“Judicial Reform and the Law and Development Movement”

Judicial independence has long been a favoured subject of activity in the law and development movement. It represents an ideal that almost all lawyers, judges, justice ministers, and development practitioners support. But how is judicial independence created where it does not exist, or where there is not a long or string tradition of it?

In this presentation I will argue for the prime importance of judicial independence, indicate what its implications are, and suggest that it rests ultimately on having a strong system of legal education.

- 2) **Melissa CROUCH** (Professor, Faculty of Law, University of New South Wales)

“Judicial Independence in Indonesia”

In this presentation I consider the state of judicial independence in Indonesia. In democratizing regimes, it is often presumed that we need to focus primarily on reforms that prioritise judicial independence, rather than balancing this with judicial accountability. Through Owen Fiss’ idea of optimizing judicial independence rather than maximizing it, I consider the post-1998 changes that emphasised judicial independence from the executive. Given the contemporary debates about the decline of democracy, I question whether judicial independence in Indonesia in fact means that the courts also pose a threat to democracy? Despite early attempts by the Judicial Commission to exercise strong powers of accountability, the courts use the rhetoric of judicial independence to weaken these oversight powers. Through a focus on the debate over judicial appointments to the Constitutional Court, I show that there is a need for both front end and back end accountability. While the recent 2020 amendments mean that judges will not need to go through a re-appointment process for a second term but instead serve a longer term, the issue of the process of judicial appointments to the court remains. Although much attention has focused on how the executive and

legislature is eroding democracy, I show that the courts have also contributed to the decline of democracy.

3) **Cho Mar HTAY** (Deputy Director, Constitutional Tribunal of the Union of Myanmar)

“Challenges of the Independence of the Constitutional Tribunal in Myanmar”

Judicial Independence is not only a crucial element but also a prerequisite of the rule of law. It is vital to control the governmental power through law and it is also indispensable for building the democratic nation with proper legal culture. This paper sums up the briefest history of Judicial Independence from the period of 1948 to 2010 (1948-1962 era, 1962-1974 era, 1974-1988 era, SLORC and SPDC era). Judicial Independence is also relevant with both international law and national law. This paper also discusses and analyzes the international norms for basic principles on the Independence of the Judiciary laid down by Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1985, in comparing with the provisions of the Constitution of Myanmar, 2008. Judicial Independence is critical bedrock for constitutional review because the Constitutional Courts or Tribunals exercise the constitutional jurisdiction to examine the validity and constitutionality of laws and executive powers. In this context, this paper illustrates how the independence of the Constitutional Tribunal of Myanmar was operated under the 2008 Constitution with relevant cases and decisions by the Tribunal and serious challenges on judicial independence faced from political forces in the period of 2011 to 2020. This paper also focuses on the loop holes of the Law of Constitutional Tribunal which is found as challenges while the Tribunal performs its judicial functions in practice. Further, it points out the important role of the well-trained legal personnel in a strengthening legal system to revive the judicial independence in the future.

4) **Ratana TAING** (Secretary-General of the Constitutional Council of Cambodia)

“The Constitutional Council of Cambodia: An Independent Institution in Ruling on Electoral Litigations”

This article is made in the attempt at sharing the knowledge on the important roles of the Constitutional Council of the Kingdom of Cambodia; which is a supreme, independent, and neutral institution guaranteeing the respect for the Constitution. The main parts of this paper cover (i) the

Constitutional Council in brief and its roles concerning the electoral litigation process (ii) some notable practices, and (iii) challenges and way towards. The readers of this paper will gain knowledge concerning Cambodia's resolution as an independent institution competent in ruling on the electoral litigations. At the end, this paper made intents to show the stand of the Constitutional Council in the context of Cambodia's election period.

5) Ngoc Son BUI (Assistant Professor of Chinese University of Hong Kong)

“Judicial Independence in Vietnam”

In 2005, the Politburo of the Vietnamese Communist Party launched the long-term judicial reform campaign called *The Strategy for Judicial Reform until 2020*. This presentation looks at 15 years of judicial reforms in Vietnam from the perspective of judicial independence. It will demonstrate that judicial reforms (e.g., the constitutional introduction of judicial power, the reconstruction of the supreme court, empowerment to the district courts, the Acreation of the precedent system, and courts' hearing administrative litigations) in the country have strengthened judicial independence, but institutional challenges (e.g., democratic centralism and party vanguardism) to judicial independence have remained. The presentation will discuss the jurisprudential, political, and socio-economic factors of these achievements and challenges.