Introduction:
Constitutions and Difference:
Ideology and Institutions

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One of the most vexing problems in the theory and practice of politics is the issue of difference. How do we build a just and stable polity in the face of identity differences that have historically been the basis for inequality, injustice, and violence? Such differences can take a variety of forms, including religious difference, race and ethnicity, language difference, urban/rural tensions, and gender. In many countries, divisions such as these are the fault lines that threaten the stability of the social and legal order. This book addresses the role of constitutions and constitutionalism in dealing with the challenge of difference.

In the spring of 2011, a conference held at Indiana University (IU) brought together a distinguished group of lawyers, political scientists, historians, religious studies scholars, and area studies experts to consider how constitutions and constitutionalism address issues of difference across a wide swath of the world we called Pan-Asia.\(^1\) Pan-Asia runs from the Middle East through Central Asia, South Asia, Southeast Asia, East Asia, and into Oceania. This is a meta-region across which ideas and influences have traveled for centuries. It is also an area of the world that includes every type of difference in abundant supply. Pan-Asia, therefore, provides a wonderful laboratory for examining the role of constitutions in addressing difference.

The existing literatures, while rich in other ways, do not speak directly to this issue of constitutions as a mechanism for addressing difference. There is a vast political theory literature on the relationship between

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\(^1\) The conference was supported by the Australian National University (ANU), the Pan-Asia Institute at IU, the Maurer School of Law, and several Centers at IU, including the Center for Constitutional Democracy, the Center for the Study of Global Change, and the Center for the Study of the Middle East.
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democracy and difference. There is also a substantial political science literature on the connection between specific governmental structures – particularly electoral systems and federalism – and the management of difference. This book differs from these existing literatures in three ways.

First, unlike the political theory literature addressing difference as an issue in democratic politics, this book focuses on the role of constitutions and constitutionalism as a tool for the management of difference. Not all democracies are constitutional and not all constitutions are democratic. Indeed, the countries discussed in this book include authoritarian regimes along with both stable and struggling democracies. Although the connections and tensions between democracy and difference have been deeply examined by political theorists, the role of constitutions in particular is much less studied. Thus, the political theory literature addresses issues such as whether difference is best understood as a matter of interests or of identities, or whether pluralist liberal democracies are required to respect and accommodate illiberal communities within them. This book, alternately, asks about the roles that constitutions play in defining, mediating, or exacerbating difference. This inquiry raises questions about the institutional and the ideological implications of the basic legal order in managing difference.

Second, the book is interdisciplinary and speaks across the discipline-based boundaries that often divide this conversation. The broad range of approaches and the explicit effort to be accessible to a cross-disciplinary audience differentiate it from the political science literature concerned

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with specific political and legal institutions in the management of difference. The contributors to this book are a distinguished collection of law professors, historians, political scientists, area studies specialists, religious studies scholars, and activists. They bring an extremely broad range of educational backgrounds and practical experiences to the project. The interaction of different sets of disciplinary assumptions and goals, different theoretical lenses, different practical agendas, and different experiences generates a synergy impossible within any single discipline.

Third, the book has a wide geographical focus that allows for important comparative perspectives. The Pan-Asia region covers approximately two-thirds of Earth’s land mass and an even higher percentage of its population. It also represents a meta-region across which ideas, goods, and peoples have moved for millennia. Pan-Asia includes all the major world religions, countless ethnic and linguistic groups, and a wide range of constitutional systems. It offers an incredibly rich set of cases through which to examine the complex interplay of constitutions and difference.

THE CONTENTS AND ORGANIZATION OF THE BOOK

The book is organized conceptually – around the types of differences that have created challenges in countries around the world – rather than

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5 This geographical breadth distinguishes this book from one of the few other books addressing constitutions and difference in general: Michel Rosenfeld, ed., Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives (Durham: Duke University Press, 1994). The contributions in Rosenfeld’s excellent volume are overwhelmingly focused on North American and European examples and literatures, whereas this book will focus on a wide swath of the rest of the world. In addition, of course, much has happened in the world in relation to both constitutionalism and difference over the past twenty years.
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geographically. There are five sections, each devoted to a particular type of difference: religion, ethnicity/race, urban/rural divisions, language, and gender and sexual orientation. In each section, the chapters examine the constitutional significance of the particular difference at issue in two or more countries in Pan-Asia.

Part I of the book addresses language. In Chapter 1, Benjamin Cohen looks at the development of the successful constitutional approach to language policy in India. He traces the history of the politicization of language difference and describes how the drafters of India’s constitution managed to defuse this issue. By taking a fundamentally pragmatic approach – recognizing and accommodating language diversity while building on existing foundations for a common language – the Constitution transformed a line of division that was fraught with violence at the start of the nation into a source of strength and stability.

In Chapter 2, William Fierman looks at the issue of language in Kazakhstan and compares it to the Baltic and Caucasus republics on the one hand and the other Central Asian republics on the other hand. He finds that although all of these countries shared a political focus on shifting from Russian to the language of the titular group in each republic, the outcome varied because of two important factors. First, in some countries the status of the language of the titular group facilitated this shift, whereas in others that status inhibited it. Where the titular group’s language was not strong – in terms of usage, particularly by elites, and usability in a range of technical and educational settings – the transition was more difficult. Second, the authoritarian politics of some countries led to the irrelevancy of the constitutional provisions regarding language (indeed, often to the irrelevancy of the constitutions as a whole). Kazakhstan, because it suffered from both of these problems, provides an example where the constitutional provisions – although symbolically significant – have little effect on the actual practice.

Taken together, Chapters 1 and 2 raise a series of interesting questions concerning the role of constitutions in dealing with language difference. First, they suggest that there is a broad range of issues that a constitution may address regarding language. One issue is whether to choose a single official or national language. This issue can generate conflict between competing language groups (as in India), highlight the practical limitations of a language that has been marginalized for generations (as in Kazakhstan), and connect to issues of nationalism and subnationalism (in both countries and in the Central Asian region generally). A second, related issue the constitution may address concerns the status
and role of the language associated with the colonial power from which the nation has sought independence. This colonial legacy often carries multiple conflicting implications, as both chapters describe. A third issue the constitution may address concerns the other language groups within the country and their claims for recognition and accommodation. This issue may, in turn, be handled in a variety of ways, including through federalism (as in India) and through the use of individual rights (both in India and in the constitutions of Central Asian countries). In addition to highlighting these specific constitutional choices on language, Part I also raises a question concerning the more general understanding of the role of the constitution in dealing with language: Is the constitution primarily a pragmatic tool for managing linguistic difference or is it essentially a symbolic statement with little or no practical effect?

Part II addresses rural/urban differences. In Chapter 3, Paul Hutchcroft traces the failure of efforts to deal with corruption and patronage by shifting power and resources away from the national government and toward the provinces in the Philippines. This strategy, which has its roots both in the history of U.S. policy and in an ideology of local virtue, has led only to a system of poor governance and restricted democracy. Professor Hutchcroft suggests that the types of reforms necessary to address these problems would not focus on the issue of decentralization (i.e., on the rural/urban divide), but rather on electoral reforms and party development intended to address the interlocking system of patronage that ties local and national government together and makes it fundamentally unaccountable to the people.

In Chapter 4, Huong Thi Nguyen analyzes the use of constitutional arguments in the recent political dialogue in Vietnam surrounding the regulation of rural migrants who have been moving to urban areas at great rates. Despite the fact that Vietnam is an authoritarian regime in which the Constitution has little practical effect in limiting government – and in which there is no constitutional court or other independent enforcement mechanism – Nguyen finds that the Constitution plays an important role in the public dialogue. In particular, the specific rights to housing, freedom of movement, education, health care, work, and equality were all mobilized in the public response to recent household registration laws intended to restrict movement from rural to urban areas. In the course of this public discussion, the Constitution was used both to emphasize certain negative rights that would restrict the government’s ability to control people and to assert a consensus on certain rights regardless of one’s position on the ultimate issues of democracy and one-party rule.
Part II highlights several important ways in which a constitution or constitutional ideology may be mobilized around rural/urban difference. On the one hand, in the Philippines, the localist strategy born of a particular decentralizing ideology has failed to address the crippling problems of patronage. Thus, a focus on a particular difference – the urban center versus the rural hinterlands – has been a poor basis for addressing the underlying problem of corruption. On the other hand, in Vietnam, a universalist view of rights has been used not only to enlist public support for the claims of a relatively powerless group (rural-to-urban migrants) but also to generate some limits on the government even in the absence of democratic accountability. In this case, focusing on the common commitment to rights shared by both urban and rural people has provided an important rhetoric for curbing government abuse of power. These two cases suggest the complex interplay of ideology and institutions, each of which is shaped by the constitution, in determining whether social problems are more effectively addressed through the mobilization of difference or its elision.

Part III of the book addresses the issue of ethnicity or race. Race is, of course, a contested concept, but, for our purposes, any difference that is understood by some of the people involved in either racial or ethnic terms (as opposed to, for example, linguistic, geographical, religious, or gendered terms) fits within this section. In Chapter 5, David C. Williams offers a taxonomy of different reasons for federalism and suggests that these reasons would lead to different types of federal systems. He then assesses the situation of ethnic minority groups in Burma, showing how their contexts and motivations would lead them to want and need different types of federalism. Thus, a federal system that would satisfy all of the different minority groups would need to be asymmetrical and potentially very complex. There is, however, an important shift taking place right now: as they have fought and worked together over the decades of civil war in Burma, the ethnic minority groups are coming to see things more the same way. Their cooperation is shaping their views in ways that push them toward greater coherence. As a result, a simpler, more symmetrical system might work for them in the future. This dynamic illustrates the important point that the needs and desires of the parties to constitutional

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negotiations are, in part, a product of the constitutional process, not just an independent input in that process.

Chapter 6 by Gardner Bovingdon examines a recent and surprising turn in Chinese policy that suggests a possible abandonment of the *minzu* system of autonomy for certain areas dominated by non-Han ethnic groups. He outlines the historical and legal roots of the *minzu* policy and the political struggles over it within the Communist Party. As a result of such struggles, there has almost never been a real experience of autonomy for ethnic minorities under this system. The chapter then canvases the recent unrest in Tibet and Xinjiang and the current proposals to abandon the *minzu* system in the name of a “melting pot” vision of universal citizenship. It concludes that such a shift would actually be simply a new version of the old pattern of Han dominance over other groups. As a result, he suggests, the best path would be for China to make a more meaningful commitment to ethnic autonomy.

This part of the book raises several important issues about the relationship between constitutions and ethnic difference. First, it points out that the ideological commitments of the constitution – for example, to ethnic autonomy – may be inconsistent with the actual practice in law and politics. In China, the texts of the laws seem to promise autonomy, but, for political and cultural reasons, there has never been meaningful control by ethnic minorities over their own affairs. Second, both Chapters 5 and 6 indicate that the details of institutional arrangements are crucial to making protections for ethnic minorities work. In Burma, different sorts of federalism would be required to meet the needs of different ethnic groups, and in China, much more institutional structure is necessary to provide real autonomy. Third, Part III raises interesting questions about the interaction between constitutional ideologies and the concerns of ethnic minorities. In China, we see an ideology of universal citizenship being mobilized against the claims of ethnic groups. In Burma, we see that there is a dialectical relationship between constitutional processes and ethnic groups’ goals: their goals are part of what shapes the process, but at the same time, the constitutional process may itself shape the groups’ goals and self-understandings as well.

Part IV looks at religious differences and their relationship to constitutions. In Chapter 7, Feisal Amin Rasoul al-Istrabadi traces the divide between Shi’a and Sunna in Iraq over the issue of federalism and the ironic switch in their positions over time. In this sad and powerful story, many opportunities to reduce the divisions over this issue were missed. The role of specific historical and even personal elements in determining the
outcome of the constitutional negotiations highlights the contingency of such results – and counteracts, to some extent, the attitude of inevitability that outside commentators sometimes bring to constitutional failures. The chapter also provides a sobering account of the role of international players in constitutional processes. In this case, Chapter 7 argues that the United States, with its own agenda and its ignorance of basic cultural and political conditions, bears a great deal of the responsibility for the failures in Iraq.

Ran Hirschl explores the significance of the constitutionalization of religion in Chapter 8, arguing that, contrary to the assumptions of the Enlightenment paradigm, putting religion into the constitution may be a mechanism for state control over religion rather than the reverse. In Israel, for example, the state is defined as both democratic and Jewish. One of the areas of jurisprudence in which the meaning of a Jewish state has been developed concerns who qualifies as a Jew. The chapter describes the case law on this question and demonstrates that the courts have played an important role in restraining the influence of religious authorities by bringing them under the general principles of the rule of law. In Malaysia, Professor Hirschl argues, a similar pattern appears in the use of federalism as a mechanism to restrain the power of Shari’a courts in this Islamic state. Thus, the constitutionalization of religion is a two-edged sword: it may be sought by those wishing to strengthen religion relative to the state, but it may also result in the state taming religion.

The chapters in Part IV highlight several different ways in which religion and constitutions interact. First, specific constitutional mechanisms or provisions can become focal points for division and conflict between religious groups even if they are not explicitly concerned with religion, as federalism has in Iraq. Second, particular constitutional provisions can shore up or undercut the political power of different religious groups (or of specific authority figures within such groups). Third, ironically, constitutionalizing religion may facilitate the taming of religion by state authorities, particularly courts, which have an incentive to bring this competing authority center under control. All of these interactions raise a series of more general questions. How can a constitution deal with

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7 Another example of this sort of effect on the power of religious authorities, which is not discussed in detail in the chapters, is the inclusion of provisions concerning the role of Shari’a in the law, which is the subject of so much controversy in the post-Arab Spring countries right now. See Bassam Tibi, *The Sharia State: Arab Spring and Democratization* (London: Routledge, 2013).
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religion in a way that defuses religious strife rather than exacerbating it? How can a constitution reflect the religious identity of a country’s people (if that is what they wish) without either violating the rights of religious minorities or putting the power of the state behind particular (always contested) religious authorities? More generally, how can a constitution avoid blending religion and the state in ways detrimental to both?  

Part V deals with gender and sexuality. Although it is conceivable that a country might lack one of the other lines of division discussed (i.e., it might be completely homogeneous religiously or ethnically), every country has at least two genders (and possibly more, as the final chapter points out). Gender and sexuality have not usually been the engines of civil unrest – in the way that the other divisions discussed sometimes have – but these differences have important constitutional implications nonetheless. The struggle for recognition and equality across lines of gender and sexual difference has been a major engine for constitutional change in many places, as each of the chapters in this part demonstrates.

Kim Rubenstein and Christabel Richards-Neville begin Chapter 9 by reviewing a range of feminist views on the nature of gender difference, focusing on equality, difference, and dominance as the crucial issues. They canvass the history of women in constitution-making and in government generally in Australia, pointing out the very limited participation of women in these spheres. The authors then explore two areas of constitutional jurisprudence that might be fruitful for expanding women’s roles in politics: the meaning of representative government and the understanding of federalism. Finally, they suggest a series of future constitutional possibilities for increasing women’s political voice: electoral quotas, judicial quotas, “twinning” of electoral districts (so as to have male and female representative from each), and alternating males and females as the head of state.

In Chapter 10, Asma Afsaruddin explores the recent phenomenon of Islamic feminism. Professor Afsaruddin finds that these movements are characterized by their focus on the Qur’an rather than on the jurisprudence built around the holy text. Islamic feminists seek a religious foundation for gender equality, rather than a secular one, and they use exegesis and literary techniques to uncover male bias in many traditional interpretations of the Qur’an. The chapter places Islamic feminisms in context, relating them to other modernist movements in Islam, and it provides

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8 This formulation of the question is intended to leave open the possibility that there may be some forms of blending that are not detrimental to either.
two detailed examples of feminist theorists – one in Malaysia and one in Indonesia – including descriptions of the legal issues they worked on, the political mechanisms they used to seek reforms, and the success or failure of their efforts. The portrait of Islamic feminism that emerges from this chapter is a picture of women claiming power, respect, and equality within their own traditions.

Chapter 11, by Sean Dickson and Steve Sanders, describes the jurisprudence of India, Nepal, and Pakistan on issues relating to discrimination on the basis of sexual orientation and gender identity (SOGI). The authors find that these courts are developing an approach very different from the one prevalent in Western countries, where the focus has been on the ways in which SOGI minorities are the same as heterosexuals and where sexual orientation is foregrounded and gender identity is secondary. In South Asia, by contrast, the focus is on the ways in which certain traditionally recognized gender identities, such as *hijras*, are distinctive and deserving of protection against discrimination. Thus, instead of the Western tendency to universalize, the South Asian approach highlights local cultural categories. One result of this difference is that gender identity has been the engine of change, with sexual orientation (and concomitant protection for same-sex sexual activity) following or even missing, as in Pakistan.

The chapters in Part V illustrate some of the many ways in which gender/sexuality difference informs and is informed by constitutional values and structures. In all three chapters, we see the ways in which disadvantaged groups (women and SOGI minorities) can and do use the resources of their cultures – whether those resources are the values of federalism and representative government, the values of the Qur’an, or the existence of traditional third-gender categories – to argue for equality. This appropriation of cultures that have traditionally been used to marginalize them is one distinctive aspect of their contribution to constitutional development.

The chapters also highlight the importance of institutions for supporting ideologies of equality. In Australia, certain changes in political institutions could dramatically increase women’s roles in governance. In South Asia, changes in the way the government identifies a person’s gender on official documents were necessary to pave the path to equal treatment for *hijras*. In Malaysia and Indonesia, changes in the family law and personal status code – along with giving women greater access to Islamic education – are necessary to move toward a more equal status. Thus, an ideology of equality is insufficient without the institutional structures to support it.