

SOCIAL DIFFERENCE AND CONSTITUTIONALISM IN PAN-ASIA

In many countries, social differences, such as religion or race and ethnicity, 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. The book brings together lawyers, political scientists, historians, religious studies scholars, and area studies experts to consider how constitutions address issues of difference across “Pan-Asia,” a wide swath of the world that runs from the Middle East, through Asia, and into Oceania. The book’s multidisciplinary and comparative approach makes it unique. The book is organized into five parts, each devoted to constitutional approaches to a particular type of difference – religion, ethnicity/race, urban/rural divisions, language, and gender and sexual orientation – in two or more countries in Pan-Asia. The introduction offers a framework for thinking comprehensively about the many ways constitutionalism interacts with difference.

Susan H. Williams is the Walter W. Foskett Professor of Law and the Director of the Center for Constitutional Democracy at the Indiana University Maurer School of Law. She is the author of *Truth, Autonomy, and Speech: Feminist Theory and the First Amendment* (2004), which won the Outstanding Academic Title Award from *Choice* magazine, as well as many articles and book chapters. She is the editor of *Constituting Equality: Gender Equality and Comparative Constitutional Law* (2011). Her scholarship focuses on issues related to gender equality, constitutional design, and feminist theory.

COMPARATIVE CONSTITUTIONAL LAW AND POLICY

Series Editors:

Tom Ginsburg
University of Chicago

Zachary Elkins
University of Texas at Austin

Ran Hirschl
University of Toronto

Comparative constitutional law is an intellectually vibrant field that encompasses an increasingly broad array of approaches and methodologies. This series collects analytically innovative and empirically grounded work from scholars of comparative constitutionalism across academic disciplines. Books in the series include theoretically informed studies of single constitutional jurisdictions, comparative studies of constitutional law and institutions, and edited collections of original essays that respond to challenging theoretical and empirical questions in the field.

Volumes in the Series:

Comparative Constitutional Design edited by Tom Ginsburg (2012)

Consequential Courts: Judicial Roles in Global Perspective edited by Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (2013)

Social and Political Foundations of Constitutions edited by Denis Galligan and Mila Versteeg (2013)

Constitutions in Authoritarian Regimes edited by Tom Ginsburg and Alberto Simpser (2014)

Presidential Legislation in India: The Law and Practice of Ordinances by Shubhankar Dam (2014)

Social Difference and Constitutionalism in Pan-Asia edited by Susan H. Williams (2014)

Social Difference and Constitutionalism in Pan-Asia

Edited by

Susan H. Williams

Indiana University, Maurer School of Law



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press & Assessment
 978-1-107-03627-7 — Social Difference and Constitutionalism in Pan-Asia
 Edited by Susan H. Williams
 Frontmatter
[More Information](#)



CAMBRIDGE
 UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia
 314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
 103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
 Information on this title: www.cambridge.org/9781107036277

© Cambridge University Press & Assessment 2014

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press & Assessment.

First published 2014
 First paperback edition 2015

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication data

Social difference and constitutionalism in Pan-Asia / Susan H. Williams, Indiana University, School of Law.

pages cm. – (Comparative constitutional law and policy)
 Includes bibliographical references and index.

ISBN 978-1-107-03627-7 (hardback)

1. Constitutional law – Social aspects – Asia – Congresses. I. Williams, Susan Hoffman, 1960– editor of compilation.

KNC524.S65 2014

342.5–dc23 2013028339

ISBN 978-1-107-03627-7 Hardback

ISBN 978-1-107-59573-6 Paperback

Cambridge University Press & Assessment has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Contents

<i>List of Contributors</i>	<i>page ix</i>
Introduction: Constitutions and Difference: Ideology and Institutions <i>Susan H. Williams</i>	i
PART I. LANGUAGE	
1. Negotiating Differences: India’s Language Policy <i>Benjamin B. Cohen</i>	27
2. Constitution and Language in Post-Independence Central Asia <i>William Fierman</i>	53
PART II. URBAN/RURAL	
3. Dreams of Redemption: Localist Strategies of Political Reform in the Philippines <i>Paul D. Hutchcroft</i>	75
4. Constitutional Rights and Dialogic Process in Socialist Vietnam: Protecting Rural-to-Urban Migrants’ Rights without a Constitutional Court <i>Huong Thi Nguyen</i>	109
PART III. ETHNICITY AND RACE	
5. Asymmetrical Federalism in Burma <i>David C. Williams</i>	137

viii	<i>Contents</i>	
6.	<i>Hu Wants Something New: Discourse and the Deep Structure of Minzu Policies in China</i> <i>Gardner Bovingdon</i>	165
PART IV. RELIGION		
7.	<i>Sectarian Visions of the Iraqi State: Irreconcilable Differences?</i> <i>Feisal Amin Rasoul al-Istrabadi</i>	195
8.	<i>Constitutionalism and Religious Difference in Israel (and a Brief Passage to Malaysia)</i> <i>Ran Hirschl</i>	230
PART V. GENDER AND SEXUALITY		
9.	<i>Australia's Gendered Constitutional History and Future</i> <i>Kim Rubenstein and Christabel Richards-Neville</i>	261
10.	<i>Islamic Feminism(s): Promoting Gender Egalitarianism and Challenging Constitutional Constraints</i> <i>Asma Afsaruddin</i>	292
11.	<i>India, Nepal, and Pakistan: A Unique South Asian Constitutional Discourse on Sexual Orientation and Gender Identity</i> <i>Sean Dickson and Steve Sanders</i>	316
	<i>Index</i>	349

List of Contributors

Asma Afsaruddin is professor of Islamic studies and chair of the Department of Near Eastern Languages and Cultures at Indiana University, Bloomington. She is the author and/or editor of six books and has published numerous articles on many aspects of premodern and modern Islamic thought and intellectual history. Her publications include *Striving in the Path of God: Jihad and Martyrdom in Islamic Thought* (2013); *The First Muslims: History and Memory* (2008); and the edited volume *Hermeneutics and Honor: Negotiating Female “Public” Space in Islamicate Societies* (2000). She was named a Carnegie Scholar in 2005 and has also won research grants from the Harry Frank Guggenheim Foundation and the American Research Institute in Turkey, among others.

Gardner Bovingdon is an associate professor of central Eurasian studies and international studies at Indiana University. He has conducted research in China, Taiwan, and Central Asia on the topics of nationalism, autonomy regimes, and historiography. His book *The Uyghurs: Strangers in Their Own Land* was published in 2010. He is now conducting research comparing nation building in Central Asia and China.

Benjamin B. Cohen is an associate professor of history at the University of Utah. He received his PhD in history from the University of Wisconsin, Madison. His first book, *Kingship and Colonialism in India’s Deccan* (2007), won wide acclaim. Cohen has also published several peer-reviewed articles on such topics as environmental history, institutional history, and gender history.

Sean Dickson is a Washington, DC-based associate with Sidley Austin LLP, practicing in health care and government strategies. He received his JD from the University of Michigan Law School, cum laude, where he also received his MPH in health management and policy. Prior to graduate study, Sean worked extensively in international public health,

focusing on HIV prevention, maternal health, and sexual minority rights and organizing. Sean received his BA with honors in public policy from the University of Chicago, where his undergraduate thesis was presented to Bill Gates as a gift from the university on a 2010 visit.

William Fierman is a political scientist with a specialization in Soviet and Post-Soviet Central Asia. His interests focus on policies relevant to creation of identities in Central Asia, including such areas as demography, land, and Islam. Fierman has written many articles and book chapters on language policy, particularly in Uzbekistan and Kazakhstan. Professor Fierman served for eleven years as director of the Inner Asian and Uralic National Resource Center, and was the founding director when it was established in 2002. He is a professor of Central Eurasian Studies and adjunct professor of Political Science at Indiana University, Bloomington.

Ran Hirschl is a professor of political science and law and holds a Canada Research Chair in Constitutionalism, Democracy and Development at the University of Toronto. He is the author of three books: *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004 and 2007); *Constitutional Theocracy* (2010), winner of the 2011 Mahoney Prize in Legal Theory; and *Comparative Matters* (2014), as well as more than seventy articles and book chapters on comparative constitutionalism, the judicialization of politics, constitutional law and religion, and the intellectual history of public law. He holds a PhD from Yale University.

Paul D. Hutchcroft is the founding director of the School of International, Political and Strategic Studies (IPS) and professor of political and social change in the Australian National University's College of Asia and the Pacific. He is a scholar of comparative and Southeast Asian politics with particular research interests in state formation and territorial politics, the politics of patronage, political reform and democratic quality, state-society relations, structures of governance, political economy, and corruption. In addition to *Booty Capitalism: The Politics of Banking in the Philippines* (1998), his work includes articles published in *Governance*, *Government and Opposition*, *Journal of Asian Studies*, *Journal of Democracy*, *Journal of East Asian Studies*, *Philippine Review of Economics*, *Political Studies*, *TRaNS*, and *World Politics* as well as chapters in edited volumes published by Cambridge, Cornell, Georgetown, Harvard, Oxford, Wisconsin, the Asia Society, and Freedom House. He is currently completing a manuscript entitled *The Power of Patronage: Capital and Countryside in the Philippines from 1900 to 2010*,

List of Contributors

xi

and he has undertaken a major new collaborative project on money politics in four Southeast Asian countries (Indonesia, Malaysia, the Philippines, and Thailand).

Feisal Amin Rasoul al-Istrabadi is the founding director of the Center for the Study of the Middle East at Indiana University (IU) – Bloomington, where he is also professor of the practice of international law and diplomacy at the Maurer School of Law and the School of Global and International Studies. He holds a visiting professorship by courtesy at the IU School of Public and Environmental Affairs. From 2004 to 2010 he served as Iraq's ambassador and deputy permanent representative to the United Nations in New York. He was the principal legal drafter of Iraq's interim constitution, the Transitional Administrative Law, in 2003–2004.

Huong Thi Nguyen is currently a PhD student in law and democracy and a research Fellow at the Center for Constitutional Democracy, Indiana University Maurer School of Law. Her research focus includes Vietnamese constitutionalism, constitutional design from a multidisciplinary perspective, and judicial review in new democracies. Huong was educated in Vietnam and France before coming to Bloomington. She received a bachelor of law degree from the University of Rennes I, a master I degree in French public law, and a master II degree in the common law from the University of Paris II, France. Huong is a co-founder of Viet Youth for Democracy and of The 88 Project, an interview project for freedom of expression in Vietnam. She also served on the constitutional study team of the Democratic Party of Vietnam.

Christabel Richards-Neville is a law student at the University of New South Wales in Australia and has been working with Professor Kim Rubenstein on her research in gender and constitutional law.

Kim Rubenstein is director of the Centre for International and Public Law at the Australian National University (ANU). In 2011–2012 she was the inaugural convenor of the ANU Gender Institute. She is the coeditor, with Professor Thomas Pogge, of the Cambridge University Press series *Connecting Public Law and International Law*. Her publications are in the areas of citizenship, nationality and gender, and constitutional law.

Steve Sanders is associate professor of law at the Maurer School of Law at Indiana University, Bloomington, where he is also an affiliated faculty member in the Department of Gender Studies and with the Kinsey Institute for Research in Sex, Gender, and Reproduction. He previously practiced for four years with the Supreme Court and appellate litigation practice group of Mayer Brown LLP, based in Chicago. He received his

JD, magna cum laude, from the University of Michigan Law School, where he also received the Bates Scholarship, the highest award to graduating seniors. Before law school he held various positions in university administration.

David C. Williams is the John S. Hastings Professor of Law and the executive director of the Center for Constitutional Democracy (CCD) at the Indiana University Maurer School of Law. He graduated magna cum laude from Harvard Law School after earning the Sarah Sears Prize for being first in his class. Williams then clerked for Ruth Bader Ginsburg on the U.S. Court of Appeals for the DC Circuit and taught at Cornell Law School before relocating to Indiana University in 1991, where he was named the Distinguished Faculty Research Lecturer in 2003. He has taught at the University of Paris and lectured around the world. He was a member of the faculty of law at the University of Cambridge and a Fellow at that university's Wolfson College, as well as the European University Institute. Williams has written widely on constitutional design, the constitutional treatment of difference, and the relationship between constitutionalism and political violence. He is the author of *The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic* (2003). He is also coeditor and primary author of *Designing Federalism in Burma* (2005). In his work with the CCD, Williams consults with a number of reform movements abroad. He advises many elements of the Burma democracy movement, the government of Liberia, the Democratic Party of Vietnam, and, most recently, the world's newest democracy, South Sudan.

Susan H. Williams is the Walter W. Foskett Professor of Law and the director of the Center for Constitutional Democracy (CCD) at the Indiana University Maurer School of Law. She has also been a visiting faculty member at the University of Paris II and a visiting Fellow at Wolfson College, Cambridge University, and at the European University Institute in Fiesole, Italy. She is the author of many articles and book chapters and has published two books: *Truth, Autonomy, and Speech: Feminist Theory and the First Amendment* (2004) and *Constituting Equality: Gender Equality and Comparative Constitutional Law* (editor, 2009). In her work with the CCD, she has acted as a constitutional advisor to the governments of Liberia and South Sudan and to democratic activists and women's organizations in Burma, Libya, Liberia, Vietnam, and Cuba. Her scholarship focuses on issues related to gender equality, constitutional design, and feminist theory.