

## Course Syllabus

**Course Title: Seminar on Human Rights and Constitutionalism in Asia**

**Course Code: Law 4060**

**Class Time and Venue: Monday 9-11 in UCA 406 (go up middle stairs—seminar room is behind computer room)**

**Instructor: Professor Michael C. Davis**

### **Course Description:**

The Seminar on Constitutionalism and Human Rights in Asia is an interdisciplinary course on the boundary of political science and law. It offers students an opportunity to explore the important themes of constitutionalism and human rights in Asia, a region that houses nearly two-thirds of the world's population and includes a wide range of cultures and developmental contexts. In thinking about human rights we confront a common observation that human rights practice is ultimately local. While the human rights movement has made extraordinary efforts in the post-World War II era to develop global standards and institutions it has been plagued by weak implementation. Significant regional human rights treaties and institutions in Europe, Africa and the Americas have sought to address this deficiency with mixed success. Even in those regions with such regional human rights regimes domestic implementation and enforcement through the institutions of constitutionalism provides a vital link for human rights implementation. As the only region without a regional human rights regime, Asia has relied more completely on domestic constitutionalism and practices to articulate and implement human rights commitments. This has made the human rights debate more seriously a matter of local politics and legal culture. In this respect, Asia has had a noteworthy engagement with some of the central themes in the human rights debate, relating human rights to culture, to the political economy of development, democratization, autonomy, development of civil society and to war and conflict. Asian discussions of these concerns have intimately connected issues of human rights, security and development. The seminar will explore these rich Asian themes and efforts. The course is open to any student interested in exploring these themes in a seminar context. As the course is interdisciplinary, no legal background is required. There are no prerequisites. *For the basic content to be addressed each week see the course schedule below.*

### **Course Objectives:**

As a seminar this course has essentially four goals:

1. To introduce students to fundamental challenges in the founding of constitutional systems and implementing human rights in Asia;
2. To confront students with both the general and area-specific problems encountered by constitutionalists and human rights activists in the Asian region;
3. To enhance the student critical facility in applying general ideas and principles to specific problems in achieving constitutional and human rights objectives; and
4. To otherwise advance the student's capacity in research, writing, presentation and critical analysis.

### **Weekly Learning Activities/Methodology:**

<i>Activity</i>	<i>In Class</i>	<i>Preparation</i>
Lecture	2 hours	4-6 hours (readings or research)
Readings Presentation	1 hour (once only)	1 hour averaged over term
Research Paper Presentation	1-2 hours (once only)	1 hour averaged over term
Research Paper	n/a	as required

### *Methodology*

Because constitutionalism and democracy are constantly under renovation in Asia, the topic lends itself well to the seminar format where exploration and debate may challenge students to think outside the box. Because of the work-in-progress nature of the topic some of the initial foundation readings take a global perspective, laying a comparative theoretical foundation for discussions in subsequent weeks and for the student's own exploration of the Asian context. The first 11 weeks of the seminar will explore a range of foundation and area specific issues, with special emphasis on the constitutional processes that situate domestic human rights debates. This will be followed in the last few weeks with student presentations and discussions of their own research papers on an approved Asian topic. Because this is a seminar students will be expected to play a more substantial role in the presentation and discussion of earlier assigned readings and provide critical reaction to their classmates' efforts. The methodology of this will be discussed in class. The seminar paper will usually be a country specific comparative examination of a significant constitutional and/or human rights question, chosen by the student, with the instructor's approval. The goal is to locate the student in the local Asian constitutionalism and human rights discourse, while affording an opportunity to explore more general themes in a substantive area of the student's interest. Because the most substantial assignment is a research paper, the students will also enjoy a chance to develop a substantial writing sample that may be of use in future applications.

### **Assessment Scheme:**

The course grade will have three components:

Class Participation—through presentation and response on readings	20%,
Presentation of Research Paper—while in progress	20%
Final Research Paper—approximately 6,000-8000 words	60%

### **Learning Resources—Assigned Texts:**

Required readings include articles and select chapters, as indicated in the weekly assignments below. There are also some optional (not required) readings indicated for each week. Articles will be made available through e-reserve or through other links or distribution. The following books are available in the library reserve, though they are not all among the required readings.

Alexander Bickel, *The Least Dangerous Branch, The Supreme Court at the Bar of Politics*, 2<sup>nd</sup> Edition (New Haven: Yale University Press, 1986).

Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: The Bobbs -Merrill Company, 1971).

-  
Tom Ginsburg, *Judicial Review in New Democracies, Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003).

Atul Kohli, ed., *The Success of India's Democracy* (Cambridge: Cambridge University Press, 2001).

Lee C. Bollinger, *The Tolerant Society, Freedom of Speech and Extremist Speech in America* (Oxford: Oxford University Press, 1986).

Larry Diamond, Marc F. Plattner, and Philip J. Costopoulos, *World Religions and Democracy* (Baltimore: Johns Hopkins University Press, 2005).

Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders* (Cornell: Cornell University Press, 1998).

### **Course Outline and Assignments:.**

Week

Topic

#### **1. Introduction**

*In this first session we will discuss the basic expectations and logistics of the course and introduce the topic of constitutionalism and human rights in Asia. This will include a brief overview of the syllabus, focusing on the difficulties the Asian region has experienced in developing constitutional democracy and the challenges posed by the human rights movement. Students may begin to consider possible specific interests for their research topic.*

#### **2. Domestic Constitutionalism, a Basic Primer on Constitutional Discourse.**

*Our substantive exploration begins with a classic theoretical book, situated in the US context, on constitutionalism and its theory. The aim is to introduce a discursive theory of constitutionalism we may consider for comparative application. The fundamental role of constitutional judicial review is considered. The US example is particularly instructive because of the role of the US in the birth of constitutionalism and in its most comprehensive development. We will consider the role of constitutionalism in domestic implementation of human rights.*

Alexander Bickel, *The Least Dangerous Branch, The Supreme Court at the Bar of Politics*, 2<sup>nd</sup> Edition (New Haven: Yale University Press, 1986). Chapters 1 and 4.

#### **Additional Optional Readings:**

Richard Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (Cambridge: Cambridge Univ. Press, 2007).

#### **3. The Institutional Processes of Constitutionalism.**

*Here we expand our foundation horizon, considering basic practices in civil and common law traditions as a prelude to considering (in the following weeks) how such institutions and underlying issues have been imported into the Asian context. The object is to understand and recognize the basic constitutional institutions used to implement the rule of law and human rights components of a modern democracy.*

Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: The Bobbs–Merrill Company, 1971). (a thin book—you may skim all)

**Logistics**—*We will discuss and finalize materials discussion duties and paper topics.*

**Additional Optional Readings:**

Mark Tushnet, *Weak Courts, Strong Rights, Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton Univ. Press, 2008).

**4. Freedom: Looking at Freedom of Expression in a Constitutional Context**

*Another foundational aspect of a discursive theory of a liberal constitution is the notion of freedom, especially freedom of expression. Enlightened theory of democracy presumed the role of the people in governance. This in turn presumed an enlightened citizenry with freedom of expression to engage the public debate. What are the boundaries of this freedom and what role does it play in constitutional governance?*

Lee C. Bollinger, *The Tolerant Society, Freedom of Speech and Extremist Speech in America* (Oxford: Oxford University Press, 1986). Chapters 2-4.

**Additional Optional Readings:**

David Kelly and Anthony Reid, eds. *Asian Freedoms, The Idea of Freedom in East and Southeast Asia* (Cambridge: Cambridge University Press, 1998).

**5. East Asia—The Asian Values Debate: Political Culture and Development.**

*Here students confront arguments that Western notions of human rights are inappropriate for Asian societies. These arguments challenge claims about the universality of human rights and the role of liberal constitutional institutions in the development process. Are human rights appropriate to East Asia? While other more specifically religious traditions will be considered below, the Confucian tradition is considered here.*

Michael C. Davis, “Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values,” *Harvard Human Rights Journal*, Vol. 11, pp. 109-47 (1998) and “East Asia After the Crisis: Human Rights, Constitutionalism and State Reform,” *Human Rights Quarterly*, 2004, Vol. 26/1, pp. 126-151.

**Additional Optional Readings:**

Ming Wan, *Human Rights in Chinese Foreign Relations, Defining and Defending*

*National Interests* (Philadelphia: University of Pennsylvania Press, 2001).  
Wm. Theodore de Bary and Tu Weiming, eds. *Confucianism and Human Rights*  
(New York: Columbia University Press, 1998).  
Joanne R. Bauer and Daniel A. Bell, eds., *The East Asian Challenge for Human  
Rights* (New York: Cambridge University Press, 1999).

## **6. East Asia—The Challenge of Constitutional Implementation.**

*Discussion will consider constitutional judicial review and the rule of law in several East Asian developmental contexts. How well does constitutionalism and the rule of law travel? What are the motivations of East Asian leaders in adopting and using institutions of constitutional judicial review? Do such institutions work well in Asia.*

Tom Ginsburg, *Judicial Review in New Democracies, Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003). Chapters 1, 2, and 3.

### ***Additional Optional Readings:***

Ran Hirschl, *Towards Juristocracy, The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004)  
Randall Peerenboom, ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (New York: Routledge, 2004).  
Fareed Zakaria, *The Future of Freedom, Illiberal Democracy at Home and Abroad* (New York: W.W. Norton and Company, 2003).

***Logistics***—Any last minute resolution of paper topics and presentation schedule.

## **7. East Asia—Will China Defy Gravity?**

*One of the biggest puzzles of the new millennium is the relationship between China's rapid economic development and its political and constitutional reform agenda. A marked characteristic of rapid economic development in East Asia has been the emergence of democratization. Economic developmental success appears likely to produce demands for political reform. Chinese scholars and others have puzzled over the constitutional and human rights implications of China's success.*

Henry S. Rowen, "When Will the Chinese People be Free?" *Journal of Democracy*, Vol. 18/3, pp. 38-64 (2007). (including comments by Minxin Pei and Dali Yang)  
Thomas Carothers, "How Democracies Emerge: the 'Sequencing' Fallacy," *Journal of Democracy*, Vol. 18/1 (2007), with further comments in Edward D. Mansfield and Jack Snyder, "The Sequencing 'Fallacy,'" *Journal of Democracy*, Vol. 18/3, pp. 5-9 (2007)

### ***Additional Optional Readings:***

Minxin Pei, *China's Trapped Transition, The Limits of Developmental Autocracy,*" (Cambridge: Harvard University Press, 2006).  
Ann E. Kent, *Between Freedom and Subsistence: China and Human Rights* (Hong Kong: Oxford University Press, 1992).

## **8. South Asia—India and Asian Democracy.**

*As the world's largest democracy India has appeared to defy the gravity that often plagues underdeveloped countries in sustaining a vibrant democracy. India has sustained democracy under difficult economic conditions for over five decades. What is the secret to India's constitutional success? Has democracy mediated the ethnic and religious conflicts that have plagued South Asian Society or has it made matters worse?*

Sumit Ganguly, "India's Unlikely Democracy," *Journal of Democracy*, Vol.18/2, April 2007, at 30-83. (includes articles by Ganguly, Mehta, Sinha, and Jenkins)

### ***Additional Optional Readings:***

Sumit Ganguly, Larry Diamond, and Marc F. Plattner, eds., *The State of India's Democracy* (Baltimore: Johns Hopkins Univ. Press, 2007).

[http://www.press.jhu.edu/books/title\\_pages/9600.html](http://www.press.jhu.edu/books/title_pages/9600.html)

Atul Kohli, ed., *The Success of India's Democracy* (Cambridge: Cambridge University Press, 2001).

A.G. Noorani, *Citizens' Rights, Judges and State Accountability* (New Delhi: Oxford University Press, 2002).

***Progress reports:*** We will discuss everyone's research progress.

## **9. Democracy, Human Rights and Asian Religions.**

*The original thesis of "orientalism" and its critique related to Islamic culture across South Asia to the Middle East and North Africa. Later, when Samuel Huntington spoke of a "clash of civilizations" he clearly had Islamic culture in mind, though he more famously extended this claim to Confucianism. We have considered Confucianism in our earlier discussion of Asian values. What about other more strictly religious traditions? Can Islam accommodate human rights and liberal constitutionalism? Can Hinduism and Buddhism? Why has democracy so challenged the societies of this region and what role has religion played?*

Alfred Stepan, "Religion, Democracy, and the "Twin Tolerations," in Larry Diamond, Marc F. Plattner, and Philip J. Costopoulos, eds. *World Religions and Democracy* (Baltimore: Johns Hopkins University Press, 2005) pp. 3-26.

Pratap Bhanu Mehta, "Hinduism and Self-Rule," in Diamond, Plattner and Costopoulos, at pp. 56-69.

Aung San Suu Kyi, *Burma's Quest for Democracy*, Diamond, Plattner and Costopoulos, at pp. 75-84.

Saad Eddin Ibrahim, "Toward Muslim Democracies," *Journal of Democracy*, Vol. 18/2 (2007), pp. 5-13.

### ***Additional Optional Readings:***

Ann Elizabeth Mayer, *Islam and Human Rights, 3<sup>rd</sup> Edition* (Boulder: Westview Press, 1999).

John L. Esposito, *The Islamic Threat, Myth or Reality*, 3<sup>rd</sup> Edition (New York: Oxford University Press, 1999).

Barry Sautman and June Teufel Dreyer, eds., *Contemporary Tibet* (Armonk, NY: M.E.Sharpe, 2006)

### **10. State Sovereignty and Regional Autonomy in Asia—Tibet.**

*One of the problems that has plagued state-building efforts in Asia has related to the protection of nationalist groups short of independence. Secessionist efforts in such hot spots as Mindanao, Aceh, Tibet and Kashmir have posed the problem whether national interest for such regions can be met short of independence. This raises the question of autonomy. Can autonomy adequately address such national aspirations while preserving the unity of the dominant state? We will explore this question through the lens of Tibet.*

Michael C. Davis, “Establishing a Workable Autonomy in Tibet,”

[http://www.press.jhu.edu/journals/human\\_rights\\_quarterly/30.2Tibet.pdf](http://www.press.jhu.edu/journals/human_rights_quarterly/30.2Tibet.pdf)

Michael C. Davis et al, “State Sovereignty and Regional Autonomy in Asia,”  
Proceeding of the American Society of International Law, April 2008.

#### **Additional Optional Readings:**

Barry Sautman and June Teufel Dreyer, eds., *Contemporary Tibet: Politics, Development and Society in a Disputed Region* (2006).

Hurst Hannum, *Autonomy, Sovereignty and Self-determination, The Accommodation of Conflicting Rights* (Second Edition, 1996).

### **11. Intervention and Gross Human Rights Violations.**

*The war in Kosovo and the “war on terror” put international intervention and gross human rights violations back on the front page. Asia has frequently been the venue for extreme state failure and revolution. And yet the principle of sovereign independence and non-intervention has been made the highest norm of Asian international relations. How do we deal with humanitarian crises—in China’s cultural revolution, North Korea’s famine, Cambodia’s killing fields, the religious revolution of the Taliban’s Afghanistan? Should we go to war to protect human rights?*

Michael C. Davis, “International Intervention in An Age of Crisis and Terror: UN Reform and Regional Practice,” *Tulane Journal of International and Comparative Law*, Vol. 15/1, pp. 1-38, 2006.

#### **Additional Optional Readings:**

Michael Walzer, *Arguing About War* (New Haven: Yale University Press, 2004).

Foreign Affairs, *International Security of East Asia* (prepared for Victor D. Cha) (New York: Council on Foreign Relations, 2003).

Ahmed Rashid, *Jihad, the Rise of Islam in Central Asia* (New York: Penguin Books, 2003).

Michael Ignatieff, *Political Ethics in an Age of Terror: The Lesser Evil* (Princeton: Princeton University Press, 2004).

12-14. **Student presentation panels to be scheduled.**

**Optional Closing Panel Discussion.**

*Should Asia adopt a regional human rights regime? This final class can include a panel of students taken from various regional papers presented to discuss the merits and contents of such potential regional regime.*

**Recommended:**

Asian Human Rights Commission, *The State of Human Rights in Eleven Asian Nations, 2006* (Hong Kong: Asian Human Rights Commission, 2007) at

<http://www.ahrchk.net/pub/pdf/TheStateofHRin11AsianNations2006.pdf>

Asian Human Rights Charter <http://www.ahrchk.net/charter/pdf/charter-final.pdf>

Bangkok Declaration

Cairo Declaration

**Contact Details:**

Professor Michael Davis

Email: [mcdavis@cuhk.edu.hk](mailto:mcdavis@cuhk.edu.hk)

Phone: 6447-1650

TA: Irene Liang

**Academic Honesty and Plagiarism:**

Complete academic honesty is required at all times in conformity with university guidelines.

<http://www.cuhk.edu.hk/policy/academichonesty/>