SOVEREIGNTY AND THE STATE IN ASIA: THE CHALLENGES OF THE EMERGING INTERNATIONAL ORDER

Introduction by Michael C. Davis[*]

Recent differences of opinion over the Iraq War have highlighted competing perceptions of sovereignty and the state across the globe. These perceptions go beyond policy to encompass basic worldviews. In the human rights debate, questions about sovereignty and the state have long stirred conflict. In the post–Cold War era questions of military intervention for humanitarian and defensive purposes have particularly stirred this caldron. A central concern in these areas where worldviews collide relates to the principles of sovereignty and noninter-vention. In recent years the locus of the collision over the meaning of these concepts has often been the UN Security Council, as the world confronts humanitarian crises and terrorism.

Perspectives on sovereignty and intervention have varied widely among leading powers in the world. Most strikingly, it seems that the United States has embraced what some have characterized as the ''new sovereigntism,'' which emphasizes unconstrained projection of American power; much of Asia and the developing world have embraced what might be called the ''old sovereigntism,'' which emphasizes sovereign exclusivity and nonintervention; and Europe has embraced some form of ''transnationalism,'' which appears to depreciate sovereign exclusivity in favor of sovereign participation. The latter European perspective has also been shared to a considerable degree by the UN leadership, as reflected in the prominent 2004 UN Report, *A More Secure World: Our Shared Responsibility*.[1]

The concern of the current panel is to explore the notions of sovereignty and the state in Asia, in respect of three prominent players: China, India, and the Association of South Eastern Nations (ASEAN). These Asian seemingly old-sovereigntist views offer not only a collective challenge to the outside world, but internally also challenge each other. The way Asia deals with state formation and collapse has increasing implications for broader questions of international security, including the ''war on terrorism.'' A current more nuanced under-standing of this vital region may prove important to understanding the likely future evolution of world order.

Until the dawn of European colonialism, the Asian world order was made up of the transacting boundaries of several ancient civilizations. This order was challenged by European colonialism, which brought with it the nineteenth-century European concept of sovereignty and the state—a conception which emphasized sovereign exclusivity. Existing Asian traditions of sovereignty both challenged and adopted this European notion. The nineteenth-century notion of the sovereign state eventually found fertile ground in an Asia interested in overthrow-ing colonial shackles. After World War II, newly decolonized Asian countries often mobilized this conception as a weapon for national independence and to mask a dismissive attitude toward what was perceived as Western imposition of human rights. While Asia seized upon this exclusive notion of sovereignty, the post–World War II era saw a more inclusive and porous notion of sovereignty and began to construct many of the multilateral institutions we know today. Asian countries have sometimes resisted these trends, advancing principles of

nonintervention as a hedge against outside encroachment. At the same time, regional multilateral institutions have generally not flourished on Asian soil.

The three papers covered in this panel offer three quite distinct Asian perspectives. The Chinese perspective, discussed by Victoria Tin-bor Hui, is shaped by Chinese identity and history. As Hui notes, China enjoyed a state system with nascent notions of constitutionalism and sovereignty nearly two millennia before the Westphalian state system evolved in Europe. Hui challenges our understanding of both this Chinese world order and the West. She points out that the exclusive notion of sovereignty and nonintervention is not merely a Western invention of the Peace of Westphalia. Until after World War II, powerful states in the West followed a ''realpolitik view of sovereignty that sanctioned intervention, conquest and colonialism.'' Hui traces this notion of realpolitik in both the West and the East. She further notes that Confucianism contained liberal elements in both domestic and international relations. From this observation she concludes that it is wrong to view our post–World War II liberal notions of sovereignty as a Western imposition. Rather, it might be understood as a basis for a shared global understanding of international order and peace. She especially appreciates that Europe has emerged as an expanding ''zone of peace'' in the post–World War II era, while Asia has remained technically at war. Her analysis makes a case for embracing a similar liberal peace in Asia. This view seriously challenges the old-sovereigntist view of the current Chinese state.

Discussion in this panel highlighted a contrast in respect of India. As Raj Kumar describes, for India the project of economic development appears as the defining source of Indian sovereignty. In a democratic state India has mobilized a developmental notion of sovereignty. During the Cold War, socialism and resistance to Western imperialism defined Indian Cold War alignments. In the post–Cold War era the Indian state has moved beyond socialism and has been profoundly shaped by its reaction to globalization in the international sphere and governance issues in its domestic politics. As Raj Kumar describes it, this has challenged India's exercise of domestic sovereignty. Governance has become the defining issue for the realization of popular sovereignty in India. In this regard, Indian democracy has had to cope with problems of corruption. A sovereign India appears to be a country that puts developmental components of global order in the primary position in both domestic governance and international relations. One might conclude from this that India will likely take up an intermediate position between Europe and the rest of Asia that more generally favors wider international intervention on behalf of development. Because economic development has increasingly been emphasized in global responses to crises and terror, as central to international security, a developmentally oriented notion of sovereignty holds great promise.

If India's notion of sovereignty holds great promise in dealing with pressing post–Cold War concerns with crisis and terror, the efforts of Southeast Asian countries to organize regionally offer the only Asian example of sustained and substantial multilateralism. ASEAN represents East Asia's best effort to build regional economic and security communities. Tom Ginsburg describes the ASEAN effort as a ''different kind of regionalism.'' Ginsburg notes that, rather than sovereignty-eroding regionalism, ASEAN has a sovereignty-reinforcing regionalism. Such sovereignty-reinforcing regionalism ''has strengthened rather than weakened national state capacity, has underpinned much of the economic dynamism and political stability in the region.'' Ginsburg notes that the ''ASEAN way'' has been a project to strengthen states that were in many respects the artificial creations of colonialism. Regional multilateral efforts were chiefly aimed at state formation. The focus was on consolidating internal sovereignty and security. This paradigm appears to have enabled the consolidation

of state formation in the region. Ginsburg points out, however, that the post-9/11 world and the problems of terrorism have challenged the noninterference paradigm. Regional integration in the security and economic areas has increased, and an increased level of interest in the members' internal affairs has emerged.

Overall, the Asian region has posed a variety of challenges to the emerging global order. The papers in this panel highlight these challenges.

Toward a Confucian Multicultural Approach to a Liberal World Order: Insights From Historical East Asia

by Victoria Tin-bor Hui[*]

It is often argued that sovereignty means nonintervention, creating an obstacle to the construction of a new liberal world order that upholds humanitarian intervention, transitional justice, and democracy promotion beyond borders. In Asia, China is known to reject various forms of international intervention in its internal affairs. Is sovereignty a Western creation imposed on a reluctant Asia? Is the exclusive understanding of sovereignty a product of the Peace of Westphalia? Is the liberal view of inclusive sovereignty unique to the West and alien to Asian values? From an historical perspective, the answers are ''no.''

I argue that the understanding of sovereignty as nonintervention did not originate from the Peace of Westphalia. Until the post–World War II era, powerful states routinely followed the realpolitik view of sovereignty, which sanctioned intervention, conquest, and colonialism. Struggles for power, resources, and territory have been so prevalent throughout world history that we should consider this phenomenon universal rather than Western. At the same time, the liberal view of sovereignty, which advocates peaceful coexistence and shared norms, is also not unique to the modern West. In East Asian philosophy, Confucianism contains liberal elements for both interstate and state-society relations. If Europe and Asia share liberal as well as realpolitik understandings of sovereignty, then a liberal world order would not involve imposition of Western values on a reluctant Asia.

Conventional wisdom holds that sovereignty was born with the Peace of Westphalia (the treaties of Münster and Osnabrück) in 1648. However, the treaty terms said nothing about nonintervention. Rather, they were designed to regulate basic constitutional relations between the emperor and various principalities in the Holy Roman Empire. The treaties even granted the victorious powers, France and Sweden, the right to intervene in the empire, and subsequent major peace settlements continued to stipulate international intervention into various internal matters, including succession rights, minority rights, and human rights.

Intervention was not limited to such relatively benign forms. In the so-called Age of Reason, sovereignty was understood as a principle that permitted state rulers to do anything in their own self-interest. It was fair game for the strong to encroach on the weak. In the eighteenth century, Prussia, Russia, and Austria carved up Poland. At the turn of the nineteenth century, Napoleonic France conquered large segments of Europe. In the post-Napoleonic era, great powers in the Concert of Europe used armies to put down revolutionary movements across Europe. In the late nineteenth and early twentieth centuries, powerful states intensified their struggles for territories in both the colonial and European worlds. Ultimately, it was the ravage of the two world wars that led states to enshrine the principle of sovereignty as

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nonintervention and territorial integrity in the post–World War II order. In the post–Cold War era, we have come to see the norm of nonintervention as an old rule that has been made outdated by new ''problems without passports.'' Indeed, sovereignty had a realpolitik cast for most of European history.

Given this bloody European history, it may be argued that Europeans are uniquely belligerent. However, very similar power struggles occurred in other cultural regions in various historical eras, including ancient Greece, ancient Near East, ancient India, ancient China, and premodern Americas. Of all these historical systems, the ancient Chinese system in the Spring and Autumn and Warring States periods (656–221 b.c.) most closely resembles the early modern European system. In fact, ancient China exhibits markers of sovereignty years ahead of Europe.[1] The term *China* or *zhongguo* is often taken to refer to the ''Middle Kingdom.'' But *zhongguo* originally referred to ''central states,'' with z*hong* meaning ''central'' and *guo* meaning ''states'' in the classical era. The zhongguo were sovereign and territorial in that they claimed final authority over clearly demarcated territorial spaces.

In this sovereign state system, interstate relations were characterized by higher frequency of war and prevalent use of stratagems. As the very first line in the *Sunzi bingfa* (*Sunzi's Art of War*) proclaims: ''Warfare is the greatest affair of state ... [and] the Way to survival or extinction.'' To seek victory, the *Sunzi* believes that ''Warfare is the Way of deception.'' Accordingly, the ideal commander and the ideal diplomat should be masters of maneuver who are able to disguise their intentions while penetrating the schemes of their adversaries. It was fair game for powerful states to turn weaker neighbors into dependents, seize territories from them, and even conquer them altogether. The state of Qin eventually conquered the whole system in 221 b.c. by not just superior power, but also blatant violation of norms about the conduct of diplomacy and war.

After unification, China entered the imperial era with dynastic rise and decline. From the middle of the first millennium on, political units began to emerge on China's peripheries. In Korea, the Silla Kingdom unified the peninsula in 668. In Japan, the Yamato clan (approximately ca. 250–710) established predominance over rivals in the sixth century. In Vietnam, the Ly Dynasty (1010–1225) formed an independent government in the eleventh century. With the emergence of lesser states and the continual domination of China, the term *zhongguo* lost its original meaning of ''central states'' and acquired the new meaning of the ''Middle Kingdom.'' (Burma, Siam, Java and others also emerged in Southeast Asia. These countries were more influenced by Indian civilization, but they also maintained extensive relations with the Chinese court.)

For most of the imperial era, China maintained relatively peaceful relations with Korea, Japan, and Vietnam, and generally left them alone in their internal affairs. Conventional views hold that this was the result of shared norms, but historical evidence points toward rational calculation of costs and benefits. Chinese court records of course emphasized benevolence. But it is obvious that China faced grave threats from the Xiongnu, Mongolians, and Manchus in the north and northwest. The Chinese empire was even conquered by Mongolians in 1271 and Manchus in 1644. In such circumstances, it was simply not wise for the Chinese court to open new battlefronts elsewhere. Even then, the Chinese court would launch ''punitive expeditions'' if necessary, as it did to Vietnam in 1406. On their part, Vietnam, Korea, and Japan were largely willing to play subordinate roles in the Sinocentric tributary system.

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[1] On interstate and state-society relations in classical China, *see* Victoria Hui, War and State Formation in Ancient China and Early Modern Europe (2005).

Although they had to pay tributes at the Chinese court, they gained more than they paid in terms of imperial gifts and trade.

Political dynamics in East Asia changed, however, when China's power declined and Japan's power rose in the late nineteenth and early twentieth centuries. It became Japan's turn to dominate the Asian world. It was again fair game to seek victory by not just superior force, but also mass slaughters and chemical and biological weapons.

What does this historical understanding of Europe and Asia mean for the emerging world order? Although Europe and Asia shared many features of realpolitik competition for most of world history, Europe has been completely transformed in the post-World War II era. Europeans reformulated sovereignty from a justification for war to a normative agenda for peace. As a result, Europe is no longer a Hobbesian state of war, but a zone of peace where war is no longer thinkable. In contrast, the East Asian region is still technically at war— between mainland China and Taiwan and between North and South Koreas. Clearly, Asians would benefit if the European model can be extended to the Asian region. In the nineteenth century, European great powers used navies and cannons to forcibly integrate the realpolitik Asian order with the realpolitik Western order. The old realist order in which might makes right could be imposed by force. The new liberal order advocates universal values; as such, it can only be promoted by attraction. Asia and Europe share a liberal tradition which makes peaceful transformation possible.

In interstate relations, China's military classics argue that all is fair in war. In contrast, Confucianism believes that war is aberrant and that force should be used only to restore a moral-political order. Confucianism also provides for elaborate shared norms and multilateral cooperation that are compatible with the liberal peace. Similar to liberalism, Confucianism believes that international politics and domestic politics are interlinked. Although legalism advocates ruthless measures to strengthen the state and weaken the society, Confucianism prescribes normative relations in state-society relations as well as interstate relations. The *Mencius*, in particular, argues that benevolent rule was the key to hegemony because a state with good government will simultaneously secure its own strength and enjoy the sympathy of populations in other states.

Contractual state-society relations did not exist merely on paper, i.e., in philosophical texts. It is important that China was once a sovereign state system in the classical era. Theorists of the state have highlighted the military basis of citizenship in Europe. They argue that citizenship rights should be understood as recognized enforceable claims on the state that are by-products of state-society bargaining over the means of war. As war was the way to survival or extinction in the ancient Chinese system, ambitious rulers made concessions to the people so as to motivate them to fight and die in war.

On the whole, there were three major state-society bargains. The first was the provision of material welfare. Because the security of the state rested with the well-being of the peasantry, ancient Chinese rulers generally made land grants to peasants in return for military service, taxes, and corvee. The second was legal protection. In the prior feudal era, the common people had no right to know the law or why they were punished; this changed because of an effort to win popular support by progressive rulers who began to publicly promulgate legal codes. In several major states, the common people also enjoyed access to justice and appeal before higher judges.

The third bargain was freedom of expression, as testified by the ''Hundred Schools of Thoughts.'' Confucian classics believe that individuals have an innate moral conscience and admonish high officials and common people alike to speak truth to power. The doctrine of

the Mandate of Heaven insists on the ultimate sovereignty of the people: rulers enjoy the Mandate only if they serve the people; rulers lose the Mandate if they abuse the people. Mencian followers further pushed the argument to the logical conclusion: The people have the warrant to depose and execute tyrannical rulers because tyrants cease to be rulers, properly speaking. In Europe, a similar doctrine of resistance was formulated by French Huguenots only in the sixteenth century.

In short, China developed liberal ideals two thousand years ahead of Europe. It is unfortunate that classical Confucianism was overshadowed by Sunzi militarism and legalist authoritarianism in Chinese history. Chinese emperors from the Han Dynasty on claimed that they followed Confucian doctrines. However, Confucianism was merely used as a fa{{ccedilla}}ade to cover ruthless legalist rule. As a Chinese historian put it, the label ''Confucian state'' ''would have puzzled Confucius himself'' and ''horrified Mencius.''[2]

Kim Dae Jung, the first democratically elected president in South Korea, argues that the Confucian ideal of *tianxia datong* or ''peace under heaven'' can be used as an agenda for global democracy and global peace. If we restore China's hidden liberal legacy, there may be a better chance for peaceful transformation in East Asia and even a multicultural approach to a new liberal world order.

CORRUPTION, HUMAN RIGHTS, AND DEVELOPMENT: SOVEREIGNTY AND STATE CAPACITY TO PROMOTE GOOD GOVERNANCE

by C. Raj Kumar[*]

Corruption exists in most countries of the developing world, including India. The human rights–based approaches to understanding the problem of corruption recognize that corruption affects national sovereignty in ways that threaten human security, undermine human development, and impinge on fundamental rights and freedoms of people.

SOVEREIGNTY IN THE CONTEXT OF GLOBALIZATION, HUMAN RIGHTS, AND DEVELOPMENT

Sovereignty[1] has always been, and will continue to be, one of the most challenging notions of international law and international relations. Understanding the contemporary notions of sovereignty is useful to examine its impact on globalization, human rights and development. Globalization has altered the relations between people and the state, and the state and the international community, in ways that are not fully understood. Globalization has resulted in states coming to the reality of opening up their countries to trade, investment, and other forms of social, economic, cultural, and political influences. This has resulted in situations where there is an emergence of powerful global actors in the form of multinational corporations and business enterprises that are at times economically more powerful than nation-states themselves. The role of the state in assuming a leadership role in economic activities has diminished. If sovereignty is about states exercising power on the institutions of governance,

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[2] Kung-chuan Hsiao, *Legalism and Autocracy in Traditional China*, *in* SHANG YANG'S REFORMS AND STATE CONTROL IN CHINA, 125, 137 (Yu-ning Li, ed.).

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[1] *See generally*, STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 264 (1999).

globalization has altered the parameters of this power. The intrusion of new domestic and international actors into the economic activities of nation states has added a new dimension to governance. Multilateral institutions like the World Bank, the International Monetary Fund and the World Trade Organization have had their own impact on sovereignty.

Human rights discourse has posed a formidable challenge to sovereignty. Contemporary international law recognizes that human rights violations committed by one state cannot be justified even though the state commits such violations within its own borders. The development of international law and international human rights law has only strengthened the understanding that states cannot hide under the principle of sovereignty when they commit human rights violations. The jurisprudence developed by the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the formation of the International Criminal Court have only strengthened this proposition. In fact, the principle of sovereignty has continually been successfully challenged by the human rights discourse when humanitarian intervention has been justified in a number of cases, even though there is no consensus among the international community as to under what circumstances such types of intervention can be permitted. Even states that commit violations of human rights never argue that it is under their sovereign right to commit such violations against their people; rather, the typical situation is that the state is in denial about such violations. Richard Falk has observed that:

> the fundamental idea that governments must act within certain prescribed limits—that even political and military leaders might be held accountable for their actions if they amount to crimes against humanity and severe patterns of human rights abuse—represents revolutionary developments. These emergent international standards, and their implementation, are definitely challenging the idea that sovereignty provides governments with insulation against accountability provided that their actions are confined to territorial limits ... .[2]

The human rights discourse has challenged the traditional understanding of sovereignty in at least three different ways. First, the institutionalization of human rights in such international institutions as the European Court of Human Rights and the United Nations Human Rights Committee (UNHRC) has resulted in states being under an obligation to respect the decision of these institutions, which are outside the sovereign jurisdiction of a country. However, the particular state has to become a party to the optional protocol to the International Covenant on Civil and Political Rights for the decisions of the UNHRC to be binding. Second, the increasing role of nongovernmental organizations (NGOs) worldwide has indeed posed challenges to sovereignty, but not necessarily legal ones, but more of a political and moral challenge. The development of transnational civil society has ensured the shaming of states that violate human rights, as NGOs have been active in mobilizing domestic and international public opinion when human rights violations occur. This has resulted in states increasingly becoming more sensitive in responding to violations. Third, the development of domestic constitutional systems and the rule of law have resulted in the development of comparative human rights traditions in which there is a certain degree of interaction among domestic courts and human rights institutions. This is helping in the development of comparative law and also enabling different types of regional interaction among national human rights

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[2] Richard Falk, *Sovereignty and Human Rights: The Search for Reconciliation*, Issues of Democracy, May 2000, *available at* <http://www.globalpolicy.org/nations/future/0312falk.htm> (last visited 15 April 2005).

institutions.[3] Sovereignty is further eroded when the internal governance structures in a society get gradually influenced by laws, policies, and practices of other states as officials attempt to justify a certain conduct in such comparative terms.

The multilateral institutions like the World Bank, which are involved in development work, have a profound impact on the sovereignty of nations. The World Bank has exerted influence over the economic policies of states in return for the sanction of loans for development work. These policies have met with serious criticism in developing countries like India, including the fact that such practices not only undermine sovereignty in a political sense, but also violate the basic principles of democratic governance.[4] In all these issues relating to development, the question is to what extent sovereignty has been undermined when the host countries are dependent upon foreign aid and possible governance expertise of intergovernmental organizations like the UN Development Program. This also leads to the issues of financial aid and debt relief, which are connected to the prioritization of development work by nations. The development process is complex, and the fact that sovereignty gets undermined is often not emphasized, as most countries silently accept this as a legitimate trade-off for achieving their development goals.

CORRUPTION VIOLATES HUMAN RIGHTS AND UNDERMINES THE RULE OF LAW[5]

The problem of corruption in developing countries is manifested in the malfunctioning of institutions responsible for governance. There is no doubt that corruption creates a vicious atmosphere of the lack of respect for law and undermines the effective functioning of democratic institutions. As a consequence, civil, political, economic, social, and cultural rights of people are violated. This situation has undermined the democratic foundations of the state. The rule of law is protected only when there is a fairly predictable legal system that responds to problems in a reasonably fair, nondiscriminatory, and effective manner. This means that all legal, institutional, judicial, and constitutional measures intended to take efforts against corruption should be oriented toward empowering the citizenry against corruption. The best avenue to fight corruption is public vigilance backed by strong and transparent institutions. In this context, the rights-based approaches to development and governance assume significance as rights are meant to empower people.[6] There are two facets of empowerment that have to take place in developing countries for promoting effective anticorruption strategies. First, for popular sovereignty to be secure, the people need to be empowered by providing a right to corruption-free governance or other rights that will enable them to fulfill their right to corruption-free governance.

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[3] *See generally*, C. Raj Kumar, *National Human Rights Institutions—Good Governance Perspectives on Institutionalization of Human Rights*, 19 Am. U. Int'l. L. Rev. 259 (2003).

[4] Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992).

[5] For further reading, *see* Balakrishnan Rajagopal, *Corruption Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 Conn. J. Int'l L. 495 (1999); Nihal Jayawickrama, *Corruption—A Violator of Human Rights*? Transparency International Working Paper, 1998, *available at* <http://www.transparency.de/documents/work-papers/index.html> (last visited 15 April 2005); Lawrence Cocksroft, *Corruption and Human Rights: A Crucial Link*, Transparency International Working Paper, 1998, *available at* <http://www.transparency.de/documents/work-papers/index.html> (last visited 15 April 2005).

[6] For further reading on human rights based approaches to developing corruption-free governance, *see* C. Raj Kumar, *Corruption and Human Rights—Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17 Colum. J. Asian. L. 31 (2003); C. Raj Kumar, *Human Rights Approaches of Corruption Control Mechanisms—Enhancing the Hong Kong Experience of Corruption Prevention Strategies*, 5 SAN DIEGO INT'L L. J. 323 (2004).

This should be supplemented by providing forums and institutions that work to ensure the protection and promotion of the right to corruption-free governance. Access to justice remains a priority for the enforcement of this right. The judiciary and other institutions should develop mechanisms so that access to victims of corruption is available and remedial measures are quick and effective in fulfilling their rights. Second, institutions that are already working in the field of anticorruption need to be duly empowered so that political interference or other forms of vested interests do not creep into the system and affect anticorruption work. For this to happen, transparency, institutional autonomy, and functional independence of the anticorruption institutions become mandatory. This inevitably means that there has to be political will at the highest level of the government so that anticorruption becomes an important policy of the government in securing genuine popular sovereignty.

CORRUPTION IMPEDES DEVELOPMENT AND UNDERMINES THE GOVERNANCE STRUCTURE

Corruption has enormous negative consequences for development. The development of states to a large measure depends upon the economic policies and social consequences of these policies. Corruption affects both these aspects in a number of ways. It affects economic growth, discourages foreign investment, diverts resources for infrastructure development, health and other public services, education, and anti-poverty programs. In essence, corruption poses serious challenges for governance, as states cannot achieve the goals of development without ensuring corruption-free governance. The development process ought to be based upon principles of transparency in governance and accountability of the administration. However, due to corruption, there is inefficiency and inequity in resource allocation. The state will not be able to fulfill its mandate in any way; nor is there any scope for achieving social and economic development. In this context, there is a need to formulate integrated governance policies based on human rights and human development. This notion of ''developmentalizing rights''[7] is extremely relevant for developing countries like India and should be understood by evaluating the effectiveness of rights-based approaches to development and how the ''right to development'' can be implemented. There is a need to understand the relevance of the right to good governance in the process of institutionalization of human rights. The discussion on good governance should also focus on the effectiveness of anticorruption institutions and how these experiences could be usefully drawn for institutionalizing transparency in governance. Ultimately, good governance is instrumental to securing sovereignty.

THE STATE OF SOVEREIGNTY IN SOUTHEAST ASIA

by Tom Ginsburg[*]

Diversity is the first word mentioned in any discussion of Southeast Asia. As a region, Southeast Asia includes giant Indonesia and tiny East Timor, the rich microstates of Brunei

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[7] See C. Raj Kumar, Institutionalisation of Human Rights in Asia: Developmentalizing Rights to Promote Good Governance, 12 ASIA PAC. L. REV. 143 (2004).

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and Singapore and impoverished Cambodia, the predominately Christian Philippines and Theravada Buddhist Thailand. Internally, each state in the region is multiethnic and multilingual. All of this diversity has led some to question whether it makes sense to speak of Southeast Asia at all.

In the face of this diversity, what binds the region together is the Association of Southeast Asian Nations (ASEAN). Founded in 1967, ASEAN has expanded to include all the major countries in the region and has played an important role in reducing interstate conflict among nations. As a regional organization, ASEAN has been remarkably successful on a number of other fronts.

One of ASEAN's successes has been the development of a distinctive form of regionalism. Elsewhere in the world, regional organizations are seen as eroding national sovereignty. However, ASEAN has played a role in *reinforcing* sovereignty, understood in the classic sense of the UN Charter. ASEAN's sovereignty-reinforcing regionalism, which has strengthened rather than weakened national state capacity, has underpinned much of the economic dynamism and political stability in the region.

To understand how ASEAN has played this role, it is necessary to recall that each of the countries in Southeast Asia is a colonial creation, designed around the needs of the metropole. Even Siam, which retained independence, was formed in response to European colonialism and, like the colonial creations, expanded to absorb a hinterland populated by different peoples than those at the core. Thus each of these states in the region is in fact multiethnic, with peripheral areas that extended well beyond easy colonial control.

In the aftermath of independence, each of the Southeast Asian nation-builders was faced with the challenge of establishing and reinforcing central control. This challenge was easier in some places than others, and many of the security issues in the region today can be traced to efforts to consolidate artificial entities along colonial boundaries. The border regions—Mindanao, Aceh, the Burma-Thailand border—have been the source of internal separatism from the outset. As a result, state concerns about security were, primarily, internal rather than external. From the outset, then, ASEAN was an organization of relatively insecure states whose focus was on consolidating the internal aspects of sovereignty rather than external independence.

In managing relations among these states, ASEAN developed a set of norms known as the ASEAN Way, to which many attribute much of the organization's success. The touchstone of the ASEAN Way is noninterference in the internal affairs of the other members. Noninterference is taken to include refraining from public criticism of each other, refusing to provide support or sanctuary to insurgencies against other members, and a commitment to peaceful dispute resolution in interstate conflict. These norms are sometimes attributed to Javanese village practices of consensus and consultation. However, they might just as easily be traced to the UN Charter, with its demands for noninterference and peaceful resolution of disputes. In the Southeast Asian milieu, with the potential for destabilizing internal conflicts, the reinforcement of these general norms on a regional basis by ASEAN has led to the collective legitimization of the states as states, and left them free to focus on internal challenges of state-building.

ASEAN has been a remarkably successful regional organization. Since 1967, there has been no armed conflict among its members. For all their internal differences, the members have been able to join together when faced with external threat, as ASEAN states led an international condemnation of the Vietnamese invasion of Cambodia in 1979, seen to threaten core security interests of ASEAN member Thailand. By discouraging states from supporting

cross-border insurgencies against their neighbors, ASEAN has contributed to a stable political environment in the region. This in turn has been one of the key factors facilitating the region's spectacular economic growth, which in turn has further strengthened state capacity. Among all these achievements, perhaps its greatest success has been the creation of a concept of Southeast Asia in the minds of its elites, who meet regularly and form a kind of epistemic community.

The ASEAN Way is also a style of informality. The organization proceeds responsively, and institutionalization has been slow. There have been successes, particularly in the development of security forums including the ASEAN Regional Forum (ARF), which includes twenty-one countries and all major powers; the ASEAN Plus Three, which includes only China, Korea and Japan; and now an ASEAN Plus One dialogues with China. ASEAN's leadership here can be directly attributed to its sovereignty-reinforcing brand of regionalism. The quiet, private, and nonconfrontational style of the meetings and their minimal institutionalization have allowed the forums to expand, for example to include both North and South Korea in the ARF. This style has also allowed ASEAN to expand to include Burma, which the United States would prefer to treat as a pariah because of its human rights record. It should be added that ASEAN has been able to export this style to the broader regional grouping of Asia-Pacific Economic Cooperation, where ASEAN countries play a leading and prominent role.

Having played this sovereignty-reinforcing role so successfully, what of the future? The challenge of terrorism is putting some pressure on the ASEAN Way and the norms of noninterference. The threat of transnational terrorist groups in the region, such as the Jemaa Islamiya, which seeks to establish a transnational Islamic state, has been brought home to the region in painful fashion through bombings in a Bali nightclub in 2002 and in Jakarta in 2004.

The recognition of this challenge has led to an increasingly dense web of agreements. Indonesia, the Philippines, and Malaysia, for example, have concluded an antiterrorism agreement and cooperate in the extradition of criminals. At the same time, when a terrorist group is linked with what are seen as legitimate demands for self-determination, there are limits to interstate cooperation. For example, the series of attacks in early 2004 by terrorist groups in predominately Muslim Southern Thailand provoked a heavy-handed response from the government of Thaksin Shinawatra. This in turn has led to concern among Muslims in Malaysia and Indonesia about the treatment of coreligionists. Malaysia and Indonesia sought to raise the issue in a variety of regional forums, but the Thai government responded by playing the noninterference trump card. This dynamic was a reversal from the 1990s, when Chuan Leekpai's government had sought to relax the norm of noninterference, but Malaysia and Indonesia were among the most vocal proponents of noninterference. Whether bilateral cooperation can be advanced to deal with the situation in Southern Thailand is unclear, but sovereignty claims are commonly advanced and respected.

A related problem to terrorism is piracy in the straits of Malacca. Here the user states, including China, Japan, Korea, and Singapore, wish to develop a better multilateral regime to patrol and combat piracy, and the United States is increasingly engaged. The littoral states of Malaysia and Indonesia are visibly afraid of any routine outside presence. The result has been an agreement with coordinated patrolling by Malaysia, Singapore, and Indonesia but no hot pursuit of pirates across borders. This is a sign that old notions of sovereignty continue to hold sway, impeding potentially beneficial transnational cooperation.

In the economic realm, movement toward an ASEAN Free Trade Area (AFTA) is proceeding on schedule, albeit at a relatively modest pace. There are a relatively large number of transnational border issues in the region, but there have been signs recently of the possibility of pragmatic accommodation when the gains are sufficiently large. For example, tension over the thorny issue of the Spratly Islands has been partly ameliorated by a recent joint exploration agreement among China, Vietnam, and the Philippines. The sovereignty issue has been put on hold for pragmatic reasons.

Another realm in which sovereignty is implicated has been human rights. It should be remembered that Southeast Asia was the source of much of the material on both sides of the ''Asian Values'' debate in the 1990s. At one level, the Asian values claims of that period may be understood as a defensive move designed to insulate the region from Western interference. The retirement of Lee Kuan Yew and Mahathir Mohamad, and constitutional change in Thailand and Indonesia, have taken much of the bite out of these arguments. There has been, however, no serious move to establish an Asian Human Rights Commission along the lines of those that exist in Latin America, Europe, and Africa. At best, there may emerge some form of cooperation among domestic human rights commissions, but this again is a mechanism that serves to reinforce the notion of the nation-state as the primary regulator.

An example of how traditional notions of sovereignty can impede the human rights project comes from the long saga of efforts to subject the leaders of the Khmer Rouge to international criminal prosecution. Since 1997, the United Nations and the government of Cambodia have been engaged in discussions about the modalities of punishing the former leaders of the Khmer Rouge, two of whom are in Cambodian government custody. The Cambodian government passed a law in 2001 establishing an Extraordinary Chamber within the Cambodian court system, to involve a mix of local and international judges, but negotiations over proceedings broke down in 2002 because of UN concern about possible manipulation of the court by Cambodia. Cambodia insisted that its own sovereignty would be impinged should the United Nations have any supervisory function over the court, and also demanded that its domestic law would have superior status to the agreement with the United Nations. After a UN General Assembly resolution encouraged the Cambodians and the United Nations to go back to the table, an agreement was finally reached, and funding is currently being gathered to create the court. The story illustrates the continuing hold that notions of sovereignty have on the leadership of ASEAN members.

In sum, the concept of sovereignty is alive and well in Southeast Asia. The concept is a defensive one, rooted in noninterference, in accord with a view of power that places less emphasis on getting others to do what you want them to, so much as avoiding being forced to do something you don't want to.

Inevitably, comparisons will be made with the great transnational project of the European Union, wherein sovereignty is sublimated to an ''ever-closer Union.'' One can identify stark differences: the AFTA is only beginning to be constructed, and it has no large institutionalized bureaucracy with a stake in pushing integration. In addition, while conflicts among nations in the region have of course existed, there is not the strong memory of horrific intraregional war to motivate emasculation of the region's power projection capacity. The European Union also relies on strong member state capacity for the frontline implementation of EU law. Southeast Asia is a very different context, where relatively weak states have been insecure, and not confident enough in their own capacity to pursue deep transnational cooperation. Within its context, however, ASEAN has been quite successful, and the distinctive ASEAN

style has in fact heightened confidence in the region. It has laid the groundwork for the successful economic growth that has bolstered state legitimacy and capacity. The question for the future is whether and how the countries of Southeast Asia can move beyond the limits of this approach to a model of deeper integration in pressing areas of transnational challenge.