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### The State of Sovereignty in Southeast Asia

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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”<sup>7</sup> 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 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.

<sup>7</sup> 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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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.