

# From Liberal and Equal to Fraternal International Legal Order?

## Eastphalian Synthesis of Sovereignty and Governmentality

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*Universality is to be found primarily in the most inexhaustible of interpersonal experiences and expressed under the sign of fraternity, itself a phenomenon of uncommon richness.*

[Gabriel Marcel](#)

A quarter half of a century has passed since Francis Fukuyama declared in [The End of History](#) the ultimate triumph of Western liberal democracy. Contrary to this prophecy, we are witnessing the sunset of the Western liberal international legal order. It has been revealed in several critical moments that liberal internationalism has militant, interventionist character that causes paradoxical consequences of 'illiberal liberalism': in order to protect what a liberal State perceives as a liberal regime, it ironically resorts to illiberal means that violate the same values it seeks to protect. In the meantime, with the [commitment to virtually universal formal equality of State sovereignty](#), liberal internationalism domesticates issues of substantive equality pertaining to distributive justice. The structure of inequality has been aggravated by a wide variety of managerial techniques elaborated for implementing neoliberal policies. In studying the new form of power in neoliberalism, Michel Foucault famously coined the term *gouvernementalité*, i.e. mentality of government, that incrementally erodes the traditional power of sovereignty.

As a backlash against such *liberal governmentality* circumventing the *equal sovereignty* of States, the contemporary world is witnessing the sunrise of Eastern giants who envision an alternative to Western liberal order, with the Asian spirit of *brotherhood*. Typically, the Russian Federation and the People's Republic of China jointly issued the 2016 [Declaration on the Promotion of International Law](#), which asserts an understanding of international legal order anchored in State sovereignty. It is remarkable in this context that both Russia and China distinguish rules governing their interactions with Western liberal powers from [those regulating their peripheries](#). Such an unequal treatment of the strong and the weak by the hegemony may have an uncharted potential for universalising international law under the community-oriented value of brotherhood, '*the sign of fraternity, itself a phenomenon of uncommon richness*' (see the opening words of [Marcel](#)).

Against those backdrops, this contribution intends to sketch the process in which Asian countries have envisioned the shift 'from (il-)liberal and (un-)equal to fraternal international legal order' (1). It does not aim to characterise the Eastphalian rise as

the mere revival of the Westphalian sovereignty-based system; the author rather argues that the East succeeds the other type of power developed in the Western neoliberalism, i.e. governmentality (2).

### 1. Asian Ambitions for Fraternal International Legal Order

The struggle for the Eastphalian hegemony in the international legal order dates back to Japan-led Greater East Asia Co-Prosperity Sphere (*Daitoa Kyo-eiken* #### ##). Appealing to Asian liberation and *brotherhood*, Japanese leaders justified the Great East Asian War as a holy war fought by Japan as the moral leader in this region. Japanese international legal scholars responded to that ambitious project by elaborating 'Greater East Asian International Law'. For example, Kaoru Yasui, referring to Carl Schmitt's *Großraum* theory in international law, insisted that the Eastern fraternal world as a 'new order' would be emancipated from Western liberal world and its rules. Shigejiro Tabata conducted a nuanced historical analysis of the formal equality of sovereignty that resulted in promoting *de facto* substantive inequality among States. Despite these academic support attempts for Japan's *Daitoa Kyo-eiken*, that new regional order led suicidal destruction of the Empire and collapsed with the end of the War (see historical analyses of [pre-war](#) and [post-war](#) Japanese international legal scholarship by Yasuaki Onuma; and see also excellent historiographies of Japanese theories by [Yoshiro Matsui](#), [Maki Nishiumi](#) and [Josuke Ikeda](#)).

The ambition of constructing a new international legal order has strayed around the Asian region. In the contemporary era, the historical silk road recently reincarnated by China is haunted by the uncanny ghost. Seemingly, the Belt and Road Initiative, known as 'One Belt, One Road' (*yi dai yi lu* #####), underpins the absolutist notion of sovereign equality in upholding the 1954 Five Principles of Peaceful Coexistence. Meanwhile, it is observed from the [performative perspective](#) that Chinese do not view sovereignty exclusively through the absolutist-relativist dichotomy but also have 'post-relativist' viewpoint to imagine the initiative as an effort to recast international legal norms in China's own image. It is notable in this respect that China has characterised itself as '[brother](#)' of developing countries in helping them through infrastructure projects. Considering such a sign of blood-tied relations, the Initiative may be labelled '[a Confucian variant of neoliberalism](#)' that contains two constitutive elements: a continuation of economic neoliberalism prevailed by US hegemony, and a Confucian (##) kinship model of China's evolution from a peripheral node to a core production zone.

The fraternity-driven internationalism may also appear in Asian discourse of international human rights. The sovereignty-oriented 'Asian values' debate, as reflected in the Bangkok Declaration, famously reversed the hierarchy of first-generation (civil and political) rights and second-generation (economic, social and cultural) rights, with emphasising third-generation (collective) rights, particularly the right to development. Through experiencing the financial and economic crisis at the *fin de siècle*, even proponents of Asian values were forced to transform their developmentalism or socialism centered on State sovereignty in accordance with a liberal human rights conception. However, their prioritization of third- and second-generation rights over first-generation rights was not totally casted away.

In particular, the fraternal right to development retains the paramount status in the Asian discourse of human rights protection ([the National Human Rights Action Plan of China \(2016-2020\)](#); Articles 35–37 of the ASEAN Human Rights Declaration; Art. II, Para. 2, Sub. xi of the SAARC Social Charter).

### 1. A Chimera of the West and the East: Eastphalian Biopolitics

The foregoing features commonly indicate the Asian traditional preference to the community-oriented value of brotherhood. To differentiate Japanese and Chinese experiences, in contrast with the manifestly anti-liberal nature of Japan's *Dai Toa Kyohei Ken* in the past, China's Belt and Road Initiative in progress is equipped with Western innovative governmental techniques. From Foucault's analytical perspective, the governmental authority exerted by Beijing corresponds to governmentality that rests on the capability of individuals to regulate their own behaviour as efficient enterprises in compliance with market environment. In general, governmentality is based upon its structural and legal constraints on sovereign power, and therefore, leads to gradual erosion of sovereignty. The same may apply to [Chinese governmentalities](#) by which, government is a much more decentred, ad hoc and contingent affair.

It does not mean, however, that the sovereign power of government in China has been replaced by neoliberal policies and techniques. We emphasise here that China is adopting [State neoliberalism](#), namely, elitist developmentalism jealously sticking to State sovereignty even after its transformation through neoliberalism. The biopolitical amalgam of sovereignty and governmentality becomes evident, for example, in re-education camps in Xinjiang (##“New Frontier”), the ‘[core hub](#)’ of the fraternal community of the Belt and Road Initiative. According to an Expert citing credible sources in reviewing [the report of China at the Committee on the Elimination of Racial Discrimination](#), China had turned the Xinjiang Uyghur Autonomous Region into something that resembled a massive internment camp shrouded in secrecy, a ‘no rights zone’ in the name of combatting religious extremism and maintaining social stability. In the famous formula by Giorgio Agamben, this concentration camp typically represents *inclusive exclusion*: when sovereign biopower creates the state of *exception*, what is taken outside (*ex-capare*) (an excluded fragmentary body: *zoe*), is not absolutely without relation to the inside (an included political body: *bios*), but maintains itself in relation to the rule in the form of the rule's suspension.

That said, what is the unique character of that chimera of the West and the East that differentiates Eastern sovereign-governmental biopolitics from Western one? The key element is the distinctive nature between liberty and fraternity, dealing with equality in different manners. In the Western liberal world, especially [in the age of neoliberalism](#), the prevailing discourse presupposing ‘human rights *limiting* sovereignty’ has privileged first generation rights by subordinating second generation rights. The liberal biopolitics eroding sovereignty may be altered in terms of community-based fraternity reflected in third generation rights: [a Foucauldian analysis](#) sharply points out the governmental potential of second generations rights, in tandem with third generations rights, through which the enhancement of individual capacity becomes an important condition and end of collective economic development. Nonetheless, as [the author made a caveat](#), the biopolitical aspect of

human rights becomes aggravated especially in Asian countries because neoliberal governmentality rather reinforces sovereignty that has been continually obsessed by developmentalism or socialism. The fraternal biopolitics consolidating sovereignty may create an ironical circumstance of *exclusive inclusion*: the individuals included to the society are always exposed to the risk of being excluded, by means of the very socio-economic rights recognised to them, for the purpose of collective development. It is notable in this point that Chinese authorities say the camps, which they call training centers, offer [free vocational training](#) for Uighurs, Kazakhs and others, mostly Muslims, as part of a plan to bring minorities into 'a modern civilized' world and eliminate poverty in Xinjiang.

### **Concluding Remarks: (Criticising) Universality through Fraternity**

This short piece concludes that the decline of the Western liberal world and the symptom of Eastern fraternal world would not suggest a simple transition from the former to the latter; they rather mutually reveal hidden agendas behind each world's value-order. Apart from this substantive point, this contribution took a unique analytical perspective by juxtaposing sovereignty and governmentality in the West and the East. It implied an emerging field, the author names *comparative critical international legal studies*. Such a comparative method reveals analytical biases covered with, and new research perspectives precluded by, Western critical insights on international law, on the one hand; and it furthermore illuminates universal, ubiquitous phenomena of the politics of international law by relativising the essential characteristics of a multitude of power structure, on the other hand. This critical portrayal of shedding light on both Western- and non-Western governmentalities, in particular their aspect of biopolitics, is just an embryotic attempt for '*Universality [...] in the most inexhaustible of interpersonal experiences*' (see the opening words of [Marcel](#)).

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