

# HUMAN RIGHTS PROTECTION IN ASIA: “UNIVERSALITY OR CULTURAL RELATIVISM OF HUMAN RIGHTS – THE “ASIAN VALUES”

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## INTRODUCTION

Cultural features have been constantly put forward as reasons for different approaches toward human rights. While cultural argument raised by some Asian states accepts universality of many human rights, it suggests that the governments may differ in preferences, scope and form of application. This “Asian” perspective of human rights has become more important since preparation to the World Conference on Human Rights, when representatives of Asian states met in 1993 to produce the Final Declaration of the Regional Meeting for Asia of the World Conference for Human Rights.<sup>2</sup> While significant, this paper is not focused on the differences among Asian standpoints of human rights. Rather, this article aims to examine the features of the official arguments that reflect Asian perspective and to characterize cultural elements seeking to legitimate that perspective. The article is consisted of four sections. The 1st section briefly explains emergence of universal concept of human rights and cultural relativism. The 2nd section reviews origin of Asian perspective of human rights, differences of that perspective from the Western view of human rights, impact of cultural differences on the scope and form of human rights and also shortcomings of the cultural argument. As Singaporean government is a prominent proponent of cultural argument, the 3rd section examines the Singapore case as Asian model and implication of “Asian values” on its legal system. The last section describes regional protection of human rights in Asia and briefly review developing mechanisms of human rights protection like ASEAN and SAARC with referral to the Council of Europe (CoE) system as comparative model.

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<sup>2</sup> See *Bangkok Declaration*, 2 April 1993, republished in (1993) 14 H.R.L.J., 370.

## EMERGENCE OF UNIVERSAL HUMAN RIGHTS

The human rights issue earned critical importance after the violence of World War II. The massacre of over 6 million Jews, Romani and Sinti, persons with disabilities and homosexuals horrified the world. With the ultimate purpose of preventing conflict and advancing international peace nations then decided to form the United Nations (UN). People wanted to guarantee that no more in the future would anyone be unfairly deprived of life, liberty, food, home, and nationality. To support this aim, the United Nations formed a Commission on Human Rights and committed it to draft a document construing the definition of fundamental rights and freedoms delineated by the UN Charter. In 1948, 58 Members of the UN belonged to a range of cultural and religious heritages, political systems and ideologies, and also different economic circumstances. Despite the matter of culture<sup>3</sup>. On December 10 of 1948, the Universal Declaration of Human Rights (UDHR) was unanimously accepted by 56 Member States of the UN, while eight countries abstained from voting.<sup>4</sup>

Universal Declaration does not legally bind the nations.<sup>5</sup> For the purpose of making human rights binding obligations, the UN Commission on Human Rights drew up 2 treaties that embodied all the rights provided in UDHR: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Covenant on Civil and Political Rights addresses issues like the right to life, voting, expression and religious freedoms. ICESCR treats the issues like provision of food, shelter, health and education. After adoption of UDHR and international covenants, the volume of human rights has so considerably increased that international community has accepted that, at least, freedom from torture, slavery, and genocide and the right to self-determination are peremptory norms. Moreover, after adoption of the UDHR, human rights breaches are no longer purely a matter of internal affairs of a nation, but are of international concern. UDHR is universally applicable; it applies to those states that have not ratified the main human rights covenants or that were not states when the UDHR was adopted.<sup>6</sup>

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<sup>3</sup> 'A short History of Human Rights', (Umn.Edu) Available at [www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-history.html](http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-history.html) (Last accessed 27 July 2016.)

<sup>4</sup> 'The United Nations Human Rights System', (Hrea.Org) Available at [www.hrea.org/index.php?base\\_id=163](http://www.hrea.org/index.php?base_id=163) (Last accessed 10 July 2016.)

<sup>5</sup> Australian Human Rights Commission, 'What is the Universal Declaration on Human Rights?' (Humanrights.Gov.Au) Available at [www.humanrights.gov.au/publications/what-universal-declaration-human-rights](http://www.humanrights.gov.au/publications/what-universal-declaration-human-rights) (Last accessed 12 July 2016.)

<sup>6</sup> See O. Schachter, *International Law in Theory and Practice* (Nijhoff, 1991)330-42.

## CULTURAL RELATIVISM AND THE DOMINANT APPROACH

In 1947, on the period of the adoption of the UDHR, cultural relativism argument as an impediment was firstly raised by anthropologists,<sup>7</sup> who claimed that values were relative to a specific society and its cultural context and were not “universally” applicable to all nations. Afterwards, Socialist nations and Western democracies debated about first and second “generation” rights as a subject deriving from ideological and cultural choices.<sup>8</sup> Now, when we ever more esteem cultural diversity, several current researches have determined human rights views in Confucianism, Hinduism, Islam and other belief and religion frameworks.<sup>9</sup>

Although Declaration claims interdependence and indivisibility of rights two separate covenants were adopted instead of one. The only reason of the division of then-single Covenant into two distinct treaties were the ideological divergence between the Soviet Union and United States (or, in other words between the East and West) concerning the nature of different categories of rights.<sup>10</sup> Thus, following adoption of the two international treaties there emerged a dominant approach towards human rights. Dominant approach correlates human rights mainly to political and civil rights, and gives lower consideration to economic, social, cultural and so-called third generation rights.<sup>11</sup> The actions and reports of international human rights organizations<sup>12</sup> who disregard the final group of rights are apparent example of this kind of vision. This approach exists also in the UN system, in which social and economic issues are under the auspices of development organs, completely independent from human rights agencies.<sup>13</sup> The dominant approach might be linked to liberalism concept of the West.<sup>14</sup> This exactly seems to be the opinion shared by Asian states. This opinion became obvious during the preparation of the 1993 Vienna Conference. In run-up to the Vienna Conference,

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<sup>7</sup> American Anthropological Association, ‘Statement on Human Rights’ (1947) 49 *American Anthropologist* 539.

<sup>8</sup> For a description of Western and socialist views, see A. Cassese, *Human Rights in a Changing World* (Temple University Press, 1990).

<sup>9</sup> See A.A. An-Na’im, ed., *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992).

<sup>10</sup> See Daniel J. Whelan, *Indivisible Human Rights: A History of the Flawed Historiography of Covenants* (University of Pennsylvania Press, 2010) 62.

<sup>11</sup> See V. Pechota, “The Development of the Covenant on Civil and Political Rights” in L. Henkin, ed., *The International Bill of Rights* (Columbia University Press, 1981) 32.

<sup>12</sup> See, for example, the yearly reports of Human Rights Watch and Amnesty International.

<sup>13</sup> See P. Alston, “The Right to Development” in *Human Rights Yearbook*, vol. 1 (Hutchinson, 1988) 1.

<sup>14</sup> See e.g. V.A. Leary, “The Effect of Western Perspectives on International Human Rights” in A.A. An-Na’im & FM. Deng, eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Institution, 1990) 15.

representatives of Asian states met in a regional level and produced the Bangkok Declaration, which will be discussed in the next section more detailed. In the preamble of Declaration the governments reaffirmed "the interdependence and indivisibility of economic, social, cultural, civil and political rights", and noted that internalization of international human rights treaties was advanced. Moreover, it expressed "concern that these mechanisms relate mainly to one category of rights" implying political rights.<sup>15</sup> The governments stressed this opinion in their statements at the Vienna Conference. Myanmar's Minister of Foreign Affairs expressed this view in a clearest way that "[W]e must not fail to address the whole spectrum of rights ... In recent years while civil and political rights have been highlighted the right to development has not been given the attention it deserves."<sup>16</sup>

The matter of culture goes on to challenge that dominant approach. But this time cultural relativism is not raised by socialists, anthropologists, indigenous peoples, or ethnic or insular religious minorities; rather, it is raised progressively by authorities representing multilingual, mainly multi-ethnic, and increasingly capitalist and modern countries in Asia. While this is not the focus of this article, definitely, there are other human rights perspectives expressed in Asia, by non-government organizations, opposition politicians, and scholars. The opinions expressed in Bangkok Non-Governmental Organizations Declaration which was issued on March 27 of 1993 is probably, most evident among these. Compared to the governmental Declaration, civil society Declaration gives higher consideration to civil and political rights. NGO Declaration emphasizes that democracy must be "fostered and guaranteed in all countries".<sup>17</sup>

It requires governments of Asia to remove restrictions against political rights "by repealing repressive laws" and by "liberalizing the political system."<sup>18</sup> As governmental Bangkok Declaration, it requires recognition of cultural rights claiming that "[t]here is emerging a new understanding of universalism encompassing the richness and wisdom of Asia-Pacific cultures".<sup>19</sup> But civil society representatives expressly provide in the Declaration that "cultural practices which derogate from universally accepted human rights must not be tolerated."<sup>20</sup>

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<sup>15</sup> Bangkok Declaration (N1) 370.

<sup>16</sup> "Statements by Representatives of Asian Governments at the Vienna World Conference on Human Rights" in J.T.H. Tang, ed., *Human Rights and International Relations in the Asia-Pacific Region* (Pinter Press, 1995), App. 111, 213, 224.

<sup>17</sup> See Simon S.C. Tay, 'Human Rights, Culture, and the Singapore Example' (1996) 41 McGill L.J. 743, 747.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

## ASIAN PERSPECTIVE OF HUMAN RIGHTS

### The Bangkok Declaration

The Bangkok Declaration brought Asian perspective of human rights into a higher significance. In the Preamble to Declaration Asian states condemned “the imposition of incompatible values” by means of human rights.<sup>21</sup> But the governments did not completely refuse universality of human rights, as argued by many. Actually, the governments reiterated “their commitment to principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights”.<sup>22</sup> Furthermore, while accepting human rights as universal norms, the Asian view claims that there should be margin for regional and national distinctions in preferences, weight, and particular modes of implementation in approving those norms.<sup>23</sup> This attitude can be described as a kind of “weak” cultural relativism to the extent that human rights norms are approved.<sup>24</sup> But the Asian perspective prefers culture if cultural elements are not in compliance with the demand of the dominant approach of human rights.<sup>25</sup> In this meaning, Asian perspective gives weight to strong and nearly absolute cultural relativism in the level of application.<sup>26</sup> This view might be linked to opinion that culture is the superior moral value and “human rights, in particular, should not be promoted if their implementation may result in a change in a particular culture.”<sup>27</sup> This is unacceptable approach, because the elements of cultures are not always necessarily progressive and their unquestioned application could sometimes deny the universal values such as human dignity, equality etc.

The essence of the Asian values argument can be determined by examining the Bangkok Declaration, statements and speeches of the Singaporean school representatives, especially those of Senior Minister Lee Kuan Yew, who is deemed to be one of the authors of this idea. According to these sources following core civil and political rights are accepted: prohibition against slavery;<sup>28</sup> rights to equality and to due process;<sup>29</sup> freedom from torture;<sup>30</sup> prohibition

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<sup>21</sup> *Bangkok Declaration* (N 1) Preamble.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Bangkok Declaration*, (N 1) arts. 7,8,6.

<sup>24</sup> See J. Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 1989) 109-10.

<sup>25</sup> See Tay (N 16) 751.

<sup>26</sup> See R.E. Howard, ‘Cultural Absolutism and the Nostalgia for Community’ (1993) 15 *Hum. Rts. Q.* 315, 315.

<sup>27</sup> See F.R. Tesón, ‘International Human Rights and Cultural Relativism’ (1985) 25 *Va. J. Int'l L.* 869, 870.

<sup>28</sup> *Bangkok Declaration* (N 1) Art. 8.

<sup>29</sup> *Ibid.*, Arts. 14,26.

<sup>30</sup> *Ibid.*, Art. 7.

against genocide and murder;<sup>31</sup> rights to self-determination;<sup>32</sup> gender equality;<sup>33</sup> rights of religious, linguistic, and ethnic groups to their religion, language or culture<sup>34</sup> and prohibitions against racial discrimination.<sup>35</sup> Although these norms are accepted, their interpretation and application are different from the dominant approach to some extent. For example, the Asian perspective would not probably overlap with the interpretation of the European Court of Human Rights (ECtHR) of “cruel and degrading treatment” which excluded “five techniques” used in interrogation.<sup>36</sup> These methods included hooding, subjection to noise, wall-standing, deprivation of food and drink, and deprivation of sleep and the ECtHR held that the combined application of the five techniques amounted to practicing torture and inhuman treatment. The governments in Asia might not hold the identical opinion as such techniques are prohibited by the court.<sup>37</sup>

The Asian view explicitly does not agree with some other human rights and freedoms.<sup>38</sup> These are: prohibitions against capital punishment,<sup>39</sup> speech and press freedoms,<sup>40</sup> prohibition against detention without trial<sup>41</sup> which are illustrated also in ICCPR. It does not mean that these countries wholly reject the mentioned rights. Actually, for instance, there is limited freedom of expression, and legal protections and proceedings may also be available to challenge death penalty and the abuse of detention without trial.<sup>42</sup> Likewise, other political and civil rights that have been neither explicitly approved nor denied<sup>43</sup> by Asian states are in substance approved and exercised in Singapore and other countries of Asia. However, although the subsistence of these rights have been approved in theory, their application is so narrow and conditional that it can be amounted to denial in some cases.

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<sup>31</sup> *Ibid.* Art. 6.

<sup>32</sup> *Ibid.* Arts. 1, 12.

<sup>33</sup> *Ibid.*, Arts. 3, 22.

<sup>34</sup> *Ibid.*, Arts. 11, 27.

<sup>35</sup> See B. Kausikan, ‘Asia’s Different Standard’ (1993) 92 Foreign Pol’y 24, 39.

<sup>36</sup> See *Republic of Ireland v. United Kingdom* (1978), Eur. Ct. H.R. Ser. A., No. 25 at 26.

<sup>37</sup> See Tay (N 16) 753.

<sup>38</sup> See Kausikan (N 34) 40.

<sup>39</sup> See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 6 [hereafter ICCPR].

<sup>40</sup> See *ibid.*, Art. 19.

<sup>41</sup> See *ibid.*, Art. 9.

<sup>42</sup> See Tay (N 16) 754.

<sup>43</sup> *Ibid.*

## Cultural Argument and Its Flaws

Specifics of form and scope of human rights confirmation of Asian countries to some degree is related to culture. Asian governments refer to culture in the Bangkok Declaration, firstly, by requiring recognition of “the contribution that can be made ... by Asian countries with their diverse rich cultures and traditions”<sup>44</sup> and, secondly, by calling upon for human rights norms to consider “the significance of national and regional particularities and various historical, cultural and religious backgrounds”.<sup>45</sup> Despite importance of geo-political and developmental factors, which will be discussed below, the core of the Asian perspective appears to be cultural elements which explain why the Asian view is different from the dominant approach. Culture is described by the Asian argument as the element that shapes Asian people, in comparison to Westerners, more “accepting of authority”, “communitarian”, and “consensus-seeking”.<sup>46</sup> This thinking emphasizes not individual rights as Western theory, but rather duties. The individual creates and earns rights after fulfilling duties. In this manner, concepts of “rights” in Asian culture are different from their Western conceptions which view rights as axiomatic, not created.<sup>47</sup>

As mentioned above, the Bangkok Declaration introduces something else that seems to be geo-political rather than merely cultural. For example, setting human rights as criteria for aid, namely, “conditionality” has caused an overall concern.<sup>48</sup> The worry of many advocates of the Asian perspective is that Western governments discriminatively use human rights for reducing development of Asia and for maintaining power.<sup>49</sup> The Asian countries rightly raise these valid geo-political concerns, but their existence indicates that the concept of Asian values is a governmental design to a high extent. However, these governments must not raise Asian culture as a “counter-argument” to human rights rhetoric of the West. Referral to Asian culture in response to human rights claims would mean that this culture is opposed to human rights conception.

The Asian perspective also admits that many countries in Asia are in the middle of growth. To a substantial extent, Asian perspective strengthens its arguments over human rights from the

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<sup>44</sup> *Bangkok Declaration*, (N 1) Preamble.

<sup>45</sup> *Ibid*, principle 8.

<sup>46</sup> *Ibid*, 757.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid*, principle 4.

<sup>49</sup> See Kausikan (N 34) 24, 27.

point of right to development. This reasoning gives weight to the opinion that developing nations need government to hold a more powerful and central place than many Western nations assume.<sup>50</sup> Another development-based argument for the Asian perspective is that Asia, first, requires meeting economic development and related rights before it can perfectly address other rights, including civil and political rights. This basis seems vague as to whether Asia is actually on a distinct way from Western countries or is just in a transitory phase. If the latter is the case then the question emerges that when this transition will happen? This question still remains open.

The cultural argument raised by Asian governments is problematic from several aspects. Asian perspective's arguments, as delineated above, emphasize the concept of customary Asian cultures. This attitude undermines other dissenting views in the society such as expressed in NGO Bangkok Declaration. Further, it undermines also different interpretations of the Asian cultures and ancient ethical systems such as Confucian system, Hinduism and Islam. For instance, commentators have located similar values of human rights and natural law in other philosophies and religions used in Asia, such as Islam.<sup>51</sup>

Another concern with discussing about "Asian" cultural values is that the talking is inclined to stereotypes and generalizations of "Asian" identity. Moreover, it views culture as a reified and static antique, instead of transmittable matter through generations. A fixed attitude towards Asian culture disregard fragmentation of colonial ruling, lessons of independence and continuing modernization during the period of globalization.

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<sup>50</sup> See Tay (N 16) 755.

<sup>51</sup> See A.A. An-Na'im, "Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights" in C.E. Welch & V.A. Leary, eds., *Asian Perspectives on Human Rights* (Westview Press, 1990) 31.

## THE SINGAPORE MODEL

### Legal and Constitutional Background

Singapore's legal conceptions of human rights and justice also seem to be developed through the Western way. The text of the Singapore Constitution<sup>52</sup> was drawn up by the leaving British. It arranges the legal construction for democratic governance.<sup>53</sup> The Constitution of Singapore provides fundamental freedoms corresponding Western civil and political rights, like the religious freedom (art. 15), protection of life and freedom (art. 9), freedom from discrimination (art. 12), freedom of assembly, association, and speech (art. 14) Elections have been conducted in a democratic and transparent way within this structure.<sup>54</sup> The British origin of legislation was in force after independence until 1994. Moreover, the last-instance court in Singapore was the Privy Council, consisting of British judiciary seated in London. After the cessation of performance of Privy Council as an appellate court in 1994, the legislation of Singapore had started to diverge from much US and some English law concerning political and civil rights.<sup>55</sup> For example, legal system defined limits to the abovementioned fundamental freedoms by the enactment or interpretation.<sup>56</sup>

The constitution of Singapore's parliament has been made increasingly mixed through constitutional amendments.<sup>57</sup> Part of these amendments has stimulated a larger participation in policy-making process in Parliament and partly in executive branch, by advancing the earlier ceremonious Presidential office with some powers to veto.<sup>58</sup> These constitutional amendments corresponding policies purposed ensuring broader consultation and enabling more public participation in forming public policy. However, the Constitution's new mixed structure does not suggest free control for the political opposition. Contrarily, the constitutional amendments are viewed by some as supplying means through which the government may admit a broader scale of impartial ideas and voices, therefore, minifying the demand for stronger arrangement of checks and balances and for opposition. These modifications might have been achieved for the purpose of making the Constitution and laws of Singapore more compliant with Asian

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<sup>52</sup> Constitution of the Republic of Singapore (2010 Rev Ed) [hereafter *Singapore Constitution*].

<sup>53</sup> See Tay (N 16) 765.

<sup>54</sup> See *Country Reports on Human Rights Practices* (U.S. Department of State, 1992) 653.

<sup>55</sup> See Tay (N 16) 766.

<sup>56</sup> *Ibid.*

<sup>57</sup> See Thio Li-Ann, 'The Post-Colonial Constitutional Evolution of the Singapore Legislature: A Case Study' (1993) *Singapore J. Legal Stud.* 80, 110.

<sup>58</sup> See Tay (N 16) 766.

culture. It can be told that, in a single-party dominant state these changes stress “consensus” in preference to “confrontation” by permitting diverse thoughts, but by preventing the challenge and conflict of present opposition.

Review of the Singapore example from its own characteristics, its Western influence, its legal and constitutional progress, its multi-cultural society, and its willful building of Asian values, shows that Asian culture is not a preexisting natural entity and does not determine human rights. Rather, it is malleable and dynamic. Culture can be influenced either by the West or by a government that aims at creating an Asian identity which differs from the West.

### **ASIAN VALUES AND ITS IMPLICATIONS**

Towards the end of 1980, leaders of Singapore government started an exercise of determining the national or shared values of nation that “distinguish them from other peoples and countries”.<sup>59</sup> National values were discussed in parliamentary and political levels. The following fundamental values were determined in result of this process:

- 1) society before individual, and nation over community;
- 2) supporting the family as society’s core component;
- 3) community assistance and respect for the individual;
- 4) solving questions by consensus rather than confrontation; and
- 5) religious and racial harmony and tolerance.<sup>60</sup>

These selected national values are used in the building of national identity. Thus, the purpose of determining certain national values is to make a cultural differentiation between being a Singaporean and a Westerner. For example, it is held that “Western societies place more weight on the individual, while Oriental societies tend to place more weight on the group.”<sup>61</sup> However, the difference does not remain just in paper. Through giving these values with the status of “national”, different values might become dismissed and neglected, not for their worthiness, but merely due to falling out of determined shared values. The limitation to freedom of speech

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<sup>59</sup> *Ibid*, 763.

<sup>60</sup> *Ibid*, 764.

<sup>61</sup> See Lee Hsien Loong, “The National Identity – a direction and identity for Singapore” in *Speeches*, vol. 13:1 (Ministry of Information and the Arts, 1989) 26, 33.

can be justified by upholding the value of consensus; for instance, a street protest might be found detrimental against national values, since it represents an attitude of “conflict” instead of “consensus”.<sup>62</sup> Under impact of strong institutional restraints from the executive and legislative branches, courts in Singapore have intuitively seen robust protection of individual civil liberties as unsuitable in the context local peculiarities. This has caused to the underweighting of individual rights in cases where there is a potential conflict between communitarian interests and individual civil liberties such as religious freedom or liberty, which will be discussed in the next section.

### **COMMUNITARIAN MODEL OF ADJUDICATION OF CONSTITUTIONAL LIBERTIES**

The courts of Singapore have not continued an individual-centered interpretation of fundamental liberties as did Privy Council in **Ong Ah Chuan v. Public Prosecutor**<sup>63</sup>. Rather, prevailing view of the courts has been to uphold communitarian values for privileging public interests over individual liberties. For instance, the High Court in **Colin Chan v. Public Prosecutor**<sup>64</sup> affirmed supremacy of public order, declaring that while constitutional freedoms such as religious beliefs must be provided with “proper protection”, conducts in respect of them should “conform with the general law relating to public order and social protection.” Moreover, the Court held that “the sovereignty, integrity and unity of Singapore are undoubtedly the paramount mandate of the Constitution and anything, including religious beliefs and practices, which tend to run counter to these objectives must be restrained.” An approach of approving instead of revising parliamentary intention was apparent in the decision of Court of Appeal in **Jabar v. Public Prosecutor**.<sup>65</sup> This case disputed the “death row phenomenon” as a potential challenge to Article 9 of Constitution which prohibits deprivation of life or freedom “save in accordance with law.” It was claimed that execution of death penalty after more than five years having passed since the imposition to a person charged of murder was unconstitutional, as it would deny a right to life violating the condition of “accordance with law” required by Article 9(1).<sup>66</sup> This defense embodied interpreting the ban of inhuman and cruel penalty into the term

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<sup>62</sup> See Tay (N 16) 764.

<sup>63</sup> *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64; *Ong Ah Chuan v Public Prosecutor* [1980-1981] SLR 48.

<sup>64</sup> *Colin Chan v Public Prosecutor* [1994] 3 SLR 662, 688E-G.

<sup>65</sup> *Jabar v Public Prosecutor* [1995] 1 SLR 617.

<sup>66</sup> Thio Li-ann, *Legal Systems in ASEAN – Singapore, Chapter 3 – Government and the State*, 17 Available at [www.aseanlawassociation.org/papers/sing\\_chp3.pdf](http://www.aseanlawassociation.org/papers/sing_chp3.pdf) (Last accessed 15 July 2016.)

of “law” as a standard of justice that “law” involved. Taking a literal approach, the Court held that “any law which provides for the deprivation of a person’s life or personal liberty, is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well.”<sup>67</sup> However, it is noteworthy that the Court of Appeal accepted different approach in **Nguyen Tuong Van v. PP**.<sup>68</sup> The Court applied the reasonable classification test for determining the legitimacy of the rule which established distinctions among groups concerning drug-trafficking crimes and held that it was inaccurate to conclude about the constitutionality of a distinguishing feature by “a blind acceptance of the legislative fiat”. The Court held that it was the task of judiciary to determine “the proper weight that ought to be ascribed to the views of Parliament encapsulated in the impugned legislation”.<sup>69</sup>

It seems that, even with the structure of constitutional supremacy, the Singapore courts continue to give high deference to the executive in issues concerning limitations on fundamental freedoms. The Singapore High Court stressed in **Chee Siok Chin v. Minister of Home Affairs**<sup>70</sup> that “standards set down in one country cannot be blindly applied without a proper appreciation of context” as there exist “greatly varying value judgments as to what may be tolerable or acceptable in different and diverse societies.”<sup>71</sup>

## SCOPE OF RULE OF LAW CONCEPT AND JUDICIARY

The quality of rule of law is measured by quality of law, which itself is bound to perception of law. Singapore courts have demonstrated that they will only check laws to approve whether they have been adopted pursuant to accurate procedure and will remain neutral towards the substance that whether it was also “fair, just and reasonable.”<sup>72</sup> From this approach it becomes apparent that Singapore’s judiciary follows “a thin rule of law”,<sup>73</sup> as it is indifferent concerning the reasonableness, fairness and justness of laws adopted by government and thereby behaves

<sup>67</sup> *Jabar v Public Prosecutor*, at 631B.

<sup>68</sup> *Nguyen Tuong Van v PP* [2004] 2 SLR 328.

<sup>69</sup> *Nguyen Tuong Van v PP* [2005] 1 SLR 103, para. 73.

<sup>70</sup> *Chee Siok Chin v. Minister of Home Affairs* [2006] 1 S.L.R. 582 (H.C.).

<sup>71</sup> *Ibid.*, para 132.

<sup>72</sup> See above note 66.

<sup>73</sup> See Cameron Sim, *The Singapore Chill: Political Defamation and the Normalization of a Statist Rule of Law*, 324 Available at <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1011/20PacRimLPolyJ319.pdf?sequence=1> (Last accessed 28 July 2016.)

too deferential to the executive authority in interpretation of those laws. This distinctness signals that it is necessary to differentiate among “a procedural, rule-book, and thin rule of law”, and “a substantive, rights-based, thick rule of law”.<sup>74</sup> Considering that the rule of law is a debated notion, in Singapore the content of rule of law will be bound to which party of politics the matter concerns. According to Thio Li-Ann the People’s Action Party (PAP) supports “a thinner rule of law”, while politicians in opposition wish for a more rights-focused and thicker rule.<sup>75</sup> Rule of law of the government has been practiced as an instrument in stabilization of the country to ensure stability in commerce and investment.<sup>76</sup> There is a “Singaporeanized” rule of law which is apolitical in a country with vibrant economy and where “economic modernization has occurred sans political liberalization.”<sup>77</sup> Singaporean rule of law is not centered on fundamental liberties, but is instead focused on ensuring certainty for attracting foreign capital.<sup>78</sup> This certainty is further ensured by means of prioritizing established Confucianism values and community interests.<sup>79</sup> As described above Singapore courts have developed a communitarian approach, whereby the rights of the community are privileged over individual rights. In defamation cases, judiciary should define the balance among protection of freedom of expression, and protection of the accepted integrity of authority figures. That goes beyond a “subtle tension” among defending the community interests more than constitutional protection to individual rights.<sup>80</sup> The PAP defends this mode by their consideration given to Asian values, conception of the *junzi*,<sup>81</sup> and moral legitimacy,<sup>82</sup> for the purpose of protecting Singapore’s economic development. The practice of applying the rule of law for attraction of foreign investment via public policy has earned approval of judiciary. But such practice of securing economic development is debatable. It can be concluded that commercial laws are upgraded through Universalist approach and harmonization to ensure economic stability and

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<sup>74</sup> *Ibid.*

<sup>75</sup> See Thio Li-Ann, “Rule of Law within a Non-Liberal “Communitarian” Democracy: The Singapore Experience”, in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (Randall Peerenboom ed., 2004) 183-4.

<sup>76</sup> See Thio Li-Ann, ‘Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore’, (2002) 20 UCLA PAC. BASIN L. J. 1, 22, 24.

<sup>77</sup> *Ibid.*, 25.

<sup>78</sup> *Ibid.*

<sup>79</sup> See Thio (N 75) 26.

<sup>80</sup> See Eugene Kheng-Boon Tan, “‘We’ v. ‘I’: Communitarian Legalism in Singapore” (2002) 4 Australian J. of Asian L. 1, 11-18.

<sup>81</sup> In Confucianism *junzi* is referred to the ideal person.

<sup>82</sup> See Thio, (N 75) 27.

certainty,<sup>83</sup> while non-commercial laws are practiced emphasizing relativist and communitarian approach.<sup>84</sup>

## SINGAPORE' RANKING

It is not surprising that Singapore has a high ranking in international approval of property rights, liberalization of trade, economic competitiveness, business standards and legal efficiency, but it ranks lower concerning its adoption and implementation of civil and political rights like free expression, press freedom and freedom of association.

For the 20th year consequently, Singapore held 2nd ranking (following Hong Kong) among 166 economies in the 2016 Index of Economic Freedom of Heritage Foundation.<sup>85</sup> This is evaluated on 10 factors, including monetary policy, trade policy, property rights, foreign investment and government intervention. Singapore achieved the first ranking among 189 countries for “ease of doing business” according to 2015 Doing Business report of the World Bank<sup>86</sup> and fourth among 60 economies according to 2016 World Competitiveness Yearbook of the International Institute for Management Development’s (IMD) for the competitiveness of the economy.<sup>87</sup> According to government of Singapore these indicators prove its strong favor for the rule of law.<sup>88</sup> Singapore holds also high indicators in international assessments of legal system and judicial rankings. In 2015 Corruptions Perceptions Index of Transparency International, which evaluates the level of corruption among politicians and government officials, Singapore rated 8th over the globe. Likewise, in a report focused only on Asia, 2006 Asian Intelligence Report of the Political & Economic Risk Consultancy Singapore’s courts system was strongly commended, noting “Within Asia Hong Kong and Singapore are the only two systems with judiciaries that rate on a par with those in developed Western societies...”<sup>89</sup> According to Governance Indicators of World Bank, Singapore again leads in fields like the

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<sup>83</sup> See Thio (75) 29.

<sup>84</sup> *Ibid.*

<sup>85</sup> ‘Index of Economic Freedom 2016’, The Heritage Foundation, Available at [www.heritage.org/index/country/singapore](http://www.heritage.org/index/country/singapore) (Last accessed 13 August 2016.)

<sup>86</sup> ‘Doing Business 2015’, World Bank [www.doingbusiness.org/rankings](http://www.doingbusiness.org/rankings) (Last accessed 13 August 2016.)

<sup>87</sup> IMD World Competitiveness Yearbook (2016), 8 Available at [www.imd.org/uupload/imd.website/wcc/scoreboard.pdf](http://www.imd.org/uupload/imd.website/wcc/scoreboard.pdf) (Last accessed 13 August 2016.)

<sup>88</sup> See Prosperity versus individual rights? *Human rights, democracy and the rule of law in Singapore*, An International Bar Association Human Rights Institute Report (2008) 21

<sup>89</sup> *Ibid.*

control of corruption and rule of law, holding the highest rating.<sup>90</sup> But in that report, it holds considerably lower ranking on accountability and voice, which evaluates level of citizen participation in choosing their government and own free speech, freedom of press and freedom of association, rating nearly 60 per cent. It indicates that in this field 60 per cent of states rate lower than Singapore, whereas 40 per cent rate higher.

There is such a view that political rights are “traded-off” for economic development in the example of Singapore. The abovementioned achievements of Singapore are impressive, but this also means that Singapore is in the peak of its economic development which must suffice for transition to liberalization of civil and political rights. If Singapore’s this situation, is transient, it is much looked forward for bringing democracy and human rights to the same level with that of economic prosperity.

## **PROTECTION MECHANISMS OF HUMAN RIGHTS IN ASIA**

### **Regional Scale**

In sharp contrast with Europe, Africa and the Americas, Asia does not have inter-governmental human rights mechanism at regional scale which embraces the whole of the Asia-Pacific. Although it is sporadically advocated that the region needs umbrella human rights machinery similar to the other regions of the world, there are a number of complications which should be taken into account. First, Asia is too vast or heterogeneous region for a uniform human rights protection framework. Moreover, many Asian governments have ceased to accede to international human rights treaties, particularly the ICCPR and ICESCR.<sup>91</sup> But it should be mentioned that all Asian countries support economic rights and in last years they have also been accepting the right to development as component of this course. Furthermore, Asian countries are aimed to adopt, at least “core human rights” like right to life, prohibition of torture, and prohibition of slavery which correspond to what are accepted as absolute or “non-derogable” rights in international terminology.<sup>92</sup>

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<sup>90</sup> Country Data Report for Singapore, 1996-2013, Worldwide Governance Indicators, (Info.Worldbank.Org) Available at <http://info.worldbank.org/governance/wgi/pdf/c193.pdf> (Last accessed 12 August 2016.)

<sup>91</sup> See Vitit Muntanbhorn, Regional Protection of Human Rights in Asia, Asia-Pacific Human Rights Information Centre Available at [www.hurights.or.jp/archives/focus/section2/1997/12/regional-protection-of-human-rights-in-asia.html](http://www.hurights.or.jp/archives/focus/section2/1997/12/regional-protection-of-human-rights-in-asia.html) (Last accessed on 02 August 2016.)

<sup>92</sup> *Ibid.*

Despite the lack of regional human rights mechanism in Asia, in last year's there have been several consultations under the supervision of the UN to support a gradual approach towards the feasibility of an intergovernmental system.<sup>93</sup> The approach is grounded on consensus building, and also accelerating national initiatives like National Human Rights Commissions, which may give rise to discourses, interchanges, a regional networking, and step-by-step reaching toward intergovernmental machinery. The UN's Human Rights Centre financed this kind of workshops in Asia.<sup>94</sup> The message from these workshops is that, at the regional level, formal intergovernmental machinery for human rights protection is not yet realistic. But several steps can be taken to advance education, understanding, capacity-building and networking.

There are numerous NGOs functioning in Asia; several operate in regional level. Since the 1980s, NGOs have endeavored to establish a proper human rights system for the Asian nations and raised their pressure towards the governments through drafting legal instruments such as "Asian Human Rights Charter" and "Declaration of the Basic Duties of ASEAN Peoples and Government."<sup>95</sup> The Asian Human Rights Charter was a fruit of endeavors by more than 200 civil society organizations and thousands of specialists involved in the preparation period.<sup>96</sup> Considering that there is no governmental statute on human rights in Asia, Asian Human Rights Charter was an initiative of the leading regional human rights NGO Asian Human Rights Commission (AHRC). It is a charter of people reflecting the common opinion of Asian civil society, which was accepted in South Korea in May 1998.<sup>97</sup>

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<sup>93</sup> See Sou Chiam, Asia's Experience in the Quest for a Regional Human Rights Mechanism, 128-137 Available at [www.upf.pf/IMG/pdf/10-DH-Asia\\_s-Experience.pdf](http://www.upf.pf/IMG/pdf/10-DH-Asia_s-Experience.pdf) (Last accessed 03 August 2016.)

<sup>94</sup> *Ibid.*

<sup>95</sup> See Jina Kim, Development of Regional Human Rights Regime: Prospects for and Implications to Asia, 81 Available at [www.tokyofoundation.org/sylff/wp-content/uploads/2009/03/sylff\\_p57-1022.pdf](http://www.tokyofoundation.org/sylff/wp-content/uploads/2009/03/sylff_p57-1022.pdf) (Last accessed 08 August 2016.)

<sup>96</sup> *Ibid.*, 81-82.

<sup>97</sup> Asian Human Rights Charter, Asian Human Rights Commission, Available at [www.refworld.org/pdfid/452678304.pdf](http://www.refworld.org/pdfid/452678304.pdf) (Last accessed 7 August 2016.)

## Sub-Regional Scale

### ASEAN and Its Intergovernmental Commission on Human Rights

Founded in 1967, the Association of Southeast Asian Nations (ASEAN) is an intergovernmental organization consisted of 10 Member States.<sup>98</sup> ASEAN has become progressively involved in human rights after adopting its Ministerial Meeting Joint Communiqué in 1993. The Communiqué approved the indivisibility and interrelatedness of all human rights taking from 1993 Vienna Declaration and Program of Action. Moreover, it fostered ASEAN Members to actively contribute and participate in protecting and promoting human rights, to accept a uniform strategy on human rights, and to review founding a regional human rights mechanism.<sup>99</sup>

ASEAN's Charter came into force in 2008.<sup>100</sup> As one of ASEAN's goals the Charter approved protecting and promoting human rights and fundamental freedoms. ASEAN's obligation to founding a human rights mechanism was also confirmed by the Charter (Art. 14). ASEAN has three significant human rights bodies: Intergovernmental Commission on Human Rights, Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, and Commission on the Promotion and Protection of the Rights of Women and Children. As a case study the work of Intergovernmental Commission on Human Rights (AICHR), a committed human rights initiative of ASEAN will be described here.

Established in 2009, responsibilities of AICHR are: improving ASEAN's Human Rights Declaration; assisting ASEAN Members and institutions through ratification and implementation of treaties, supplying consultative and capacity building services, raising human rights awareness; and conducting researches concerning particular human rights matters.<sup>101</sup> AICHR is consisted of each Member State's representative assigned by their

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<sup>98</sup> Brunei Darussalam, Cambodia, Indonesia, the People's Democratic Republic of Lao, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

<sup>99</sup> Joint Communiqué of the Twenty-Sixth ASEAN Ministerial Meeting, Singapore, 23-24 July 1993 Available at [www.asean.org/communities/asean-political-security-community/item/joint-communication-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993](http://www.asean.org/communities/asean-political-security-community/item/joint-communication-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993) (Last accessed 5 August 2016.)

<sup>100</sup> Charter of the Association of Southeast Asian Nations, 20 November 2007, Available at [www.refworld.org/docid/4948c4842.html](http://www.refworld.org/docid/4948c4842.html) (Last accessed 8 August 2016.)

<sup>101</sup> See Kieren Fitzpatrick & Michael O'Flaherty, Background Paper, *National and Regional Human Rights Mechanisms*, 24 Available at [www.asef.org/images/docs/11thHRS\\_BackgroundPaper.pdf](http://www.asef.org/images/docs/11thHRS_BackgroundPaper.pdf) (Last accessed 06 August 2016.)

governments for the duration of 3-year. Unlike European mechanisms, the AICHR is not competent to accept and review complaints or applications from citizens. Moreover, while it is competent to demand ASEAN Members for data about their human rights promotion and protection and endeavors, it is not allowed to examine alleged human rights violations or situation of human rights in Member States. Immediate duties of the AICHR involve approving the forms of its interaction with other two human rights bodies of ASEAN mentioned above. AICHR has determined potential fields of collaboration with the Inter-American and European regional human rights mechanisms, but has still to formalize the forms of relationship with them. Moreover, AICHR plans to approve the assistance facilities to be provided to human rights organizations and NHRIs in its work. The body has undertaken actions towards this goal, attending in a “regional dialogue on UN engagement with the ASEAN human rights system” with Asian human rights organizations, NHRIs and UN agencies in 2010.<sup>102</sup>

### **SAARC AND ITS PROSPECT OF IMPROVEMENT**

Founded in 1985, objective of the South Asian Association for Regional Cooperation (SAARC) was stimulation of regional cooperation among 7 South Asian states – Sri Lanka, Pakistan, Bangladesh, Bhutan, Maldives, Nepal and India. The SAARC Charter determines goals of the Association such as promoting “the welfare of the peoples of South Asia” (Article 1a), providing “individuals with the opportunity to live in dignity and to realize their full potentials” (Article 1b), reinforcing collaboration among SAARC Members “in international forums on matters of common interests” (Article 1g), and collaborating “with international and regional organizations with similar aims and purposes” (Article 1h).<sup>103</sup> The activity of SAARC is very important in fostering cooperation between them in particular fields and making states of the region closer. Meanwhile, since it has no enforcement mechanisms, its effects and endeavours for instant human rights protection remains as “tongue without teeth”.<sup>104</sup> Although the weakness of this institution in addressing regional problems of the countries has been criticized

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<sup>102</sup> *Ibid.*

<sup>103</sup> Charter of the South Asian Association for Regional Cooperation  
Available at <http://saarc-sdmc.nic.in/pdf/charter.pdf> (Last accessed 12 August 2016.)

<sup>104</sup> See S. M. Hasan and Mst. Sabikun Naher, ‘South Asian Human Rights Mechanism: Relevance, Challenges and Recommendations’ (2013), 4(2) *Journal of SUB* 63, 72 Available at [www.sub.edu.bd/sites/default/files/journals\\_files/7\\_Hasan\\_Naher.pdf](http://www.sub.edu.bd/sites/default/files/journals_files/7_Hasan_Naher.pdf) (Last accessed 5 August 2016.)

however, it is noteworthy that it has drawn up a map of the concept of regionalism in South Asia.

As mentioned above, due to diversity and scale of the population and also the region, regional human rights defence system for whole Asia appears to be a bit unrealistic. However, considering that South Asia is the one of the leading regions of the globe experiencing mass human rights breaches<sup>105</sup> and the states in South Asia have almost common traditions and cultures, the future of regional system in this specific region is necessary and more real. As SAARC has supplied initiatives and the original structures to the human rights protection in South Asia, it loses its importance in the lack of proper implementation. For this reason, reinforcing of existing system would serve better for effective human rights protection in South Asia rather than establishment of a different mechanism distinct from SAARC. Since the South Asia needs effective and comprehensive institutional system, European model can be a good example as it serves the successful integration model and has sufficient experience. Certainly, replication of European model can work only with due consideration to the regional context including social, political, economic, technological and other circumstances. European system of human rights can be important model for the South Asia in three dimensions including Council of Europe (CoE), European Convention on Human Rights (ECHR) and the Court.

The first lesson to be taken from the European system is formation of strong institutional cornerstone that unites and holds countries together and drives them towards a common goal. The positive side of the institutional structure of the SAARC is that it already has set up the council as the head consisted of leaders of the governments of members nations. However, it lacks effective monitoring systems which results in non-implementation of the adopted agendas and plans. Thus, in order to make SAARC more functional mechanism, SAARC's Council must be provided with human rights protection competence and also effective monitoring systems.

SAARC has adopted two conventions on particular human rights matters including conventions on Combating and Prevention of Trafficking in Women and Children for Prostitution,<sup>106</sup> and Promotion of Welfare of Children.<sup>107</sup> However, it has not thought yet to

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<sup>105</sup> *Ibid*, 69-70.

<sup>106</sup> SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Available at [www.saarc-sec.org/userfiles/conv-children.pdf](http://www.saarc-sec.org/userfiles/conv-children.pdf) (Last accessed 10 August 2016.)

<sup>107</sup> *Ibid*.

adopt a particular uniform and detailed convention on human rights. Therefore, the possible solution in South Asian context would be drawing a fresh convention on human rights considering modes and forms of human rights breaches in this territory. A sound regional treaty is necessary to legally bind the nations and for proper functioning of regional law in this region.

For implementation of the convention, the court must be established as a protector of this legal basis. Drawing it from European model, the court may be granted with broad range jurisdiction such as application and interpretation of convention, accepting and deciding about complaints from individuals and states.

The regional human rights mechanism needs the concept of regionalism which has already reflected in the existence of the SAARC. However, the SAARC has failed to treat human rights problems in South Asia due to lack of effective council, monitoring system, convention and the court. Thus, South Asia would have stronger human rights mechanism if it could successfully draw inspiration from the European model.

## **CONCLUSION**

While Asian view approves universality on one side, it requires cultural relativism on the other side. Referring to culture as a legitimate ground it implements the civil and political rights in so limited way that can be amounted to denial in some cases. Thus, culture is viewed as a reasonable basis for the differences in the implementation of human rights. This article determines, however, that any variations in human rights are not mainly caused by immutable and deep cultural differences, but rather have stemmed mainly from a divergence of political ideologies and power. The problem of cultural argument is that it views culture as a fixed thing instead of living creature. Moreover, culture is not an objective ethical value and there will be people who challenge or even deny their culture wholly or partly. Nevertheless, admitting the flexibility of culture does not necessarily denies place of culture in human-rights discourse. What remains important is to determine the proper location of culture in the public moral, rather than limiting every norm with culture. If culture takes precedence over other rights, and over a more universality of human rights, this would amount to an absolutistic approach which is unacceptable. Moreover, there is already margin of appreciation doctrine invented by the ECtHR which introduces the states the space to consider the particularities of their public order when they deal with human rights issues. Therefore, margin of appreciation can be employed

for preserving cultural particularities in order to respect specifics of public order of different societies.

In the same time, usage of human rights as a tool of criticism by Western countries is not acceptable and useful also. It is a matter of another discussion that the United States, who has ratified only the ICCPR, and even that with many reservations, or formal exceptions, is also a big relativist, although it does not refer to cultural relativism. Western criticism of implementation of human rights is perceived as double standards by Asian countries, while the West keeps silence before human tragedies occurring in Palestine, Iraq and other countries.

To sum up, we live in the one world and the states need to recognize and implement the universal norms in order to reach the global peace and security. Today's chaotic and violent situation of the world will grow and reach even developed and relatively secured part of the world, until the leading states will not review their purely profit-oriented foreign policies.

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