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# Beyond “Asian Values”: Rethinking Rights

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## **Centre of Governance and Human Rights Working Papers**

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**Abstract:** *This paper assesses the supposed dichotomies between Western and Asian perspectives on human rights and shows how such tensions are often false and should be rejected. Despite the deep flaws inherent in the “Asian values” approach, however, its ideology remains a powerful internal framework that continues to influence the political and judicial elite in Southeast Asian countries like Malaysia and Singapore. This is chiefly due to the lack of any competing theory regarding the conceptualization of human rights in the Asian context. The paper point out the gap in the jurisprudence in this area and concludes with some general observations on how to advance a model of rights protection to fill this lacuna.\**

## 1. Introduction

Theories of human rights over the past half-century have broadly appeared to perpetuate a rigid dichotomy between a universalistic conception of human rights and a relativistic approach. The former so-called “Western” model has been accused of advocating an individualistic approach to rights that prioritises the individual’s rights against society; by contrast, the “Asian values” approach emphasises social stability, privileging community and duties over the rights of the individual.

Although the “Asian values” model propagated by Malaysia’s Mahathir Mohamad and Singapore’s Lee Kuan Yew in the 1990s has been criticised as a construct used by authoritarian regimes to undermine civil liberties under the guise of maintaining political stability, little effort has been made to move beyond this stagnant approach regionally and to develop a more nuanced theory of human rights through a Southeast Asian lens. The result is a lacuna in the jurisprudence dealing with the challenges of accommodating fundamental liberties within the constitutional framework of Southeast Asian countries, particularly Malaysia and Singapore.

### *Practical implications*

At present, faced with a seemingly stark choice between the two competing models, and powerful institutional constraints from the executive and legislature, courts in Malaysia and Singapore have instinctively viewed strong protection of individual rights as inappropriate for the local context. This has led to the undermining of individual civil liberties in cases where there appears to be a potential clash between communitarian interests and individual rights, such as liberty or religious freedom.

One case study that illustrates this is the 2007 case of *Lina Joy* in Malaysia, which involved a Malay-Muslim woman trying to convert from Islam and have this officially recognised as her legal status in order to marry her Christian fiancé. The Federal Court—the highest appellate court in Malaysia—ruled that Muslims who wish to convert from Islam may not do so without a certificate of apostasy from the Sharia Court. As the Sharia Court — a religious forum by definition — has never issued such a certificate to any living Malay-Muslim in Malaysia,<sup>1</sup> this creates a situation of practical impossibility for Muslims who wish to convert, despite the Article 11(1) constitutional guarantee of the right to “profess and practise” one’s religion.<sup>2</sup>

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<sup>1</sup> Brief of Amicus Curiae on Behalf of the Bar Council, Malaysia for *Lina Joy* [2007] 3 All Malay. Rep. 693 at 1.

<sup>2</sup> MALAY. CONST., ART. 11(1).

The majority was clearly concerned about community stability and religious harmony. In the leading judgment, the Chief Justice reasoned that the effects of allowing apostates to convert out of Islam would be to cause “chaos among Muslims.”<sup>3</sup> In the prior High Court decision, the judge had expressed similar sentiments, warning that it would “create chaos and confusion with the administrative authority” and “the Muslim community and the non-Muslim community as a whole.”<sup>4</sup> The tenor of the judgments suggests that remnants of the “Asian values” paradigm continue to influence the jurisprudence of the Malaysian courts — the rights of the individual are still seen as secondary to societal stability.<sup>5</sup>

In terms of executive action in Malaysia and Singapore, claims of national security also continue to be invoked by the government to justify the use of measures such as preventive detention law. The Internal Security Act (“ISA”) 1960 was used controversially in 2008 to detain an Opposition MP, a newspaper journalist, and online news editor, Raja Petra Kamarudin.<sup>6</sup> The Home Minister’s defence of the arrests bears traces of the Mahathir Model ideology that “societal unity” must be prioritised at all cost.<sup>7</sup> The Minister emphasised that “freedom without responsibilities has ramifications” and that the government did not want “anything that can threaten peace in the country.”<sup>8</sup> Although Malaysia recently abolished its Internal Security Act in March 2012,<sup>9</sup> it replaced it with the Security Offences (Special Measures) Act 2012, which has been criticised as “so widely defined so as to capture almost any form of conduct deemed undesirable by the powers that be.”<sup>10</sup>

The way a country approaches ideas of human rights and its concept of individual rights protection underpins a nation’s political, legal, and social framework, with very real and concrete consequences for individuals.

## 2. Themes Highlighting the Tension between Western and Asian Perspectives on Human Rights

In this paper, I aim to provide an analysis of the so-called Western and non-Western models of human rights protection and to reassess these themes in light of contemporary developments both internationally and domestically. This paper is made up of two parts.

The first part identifies the themes that highlight the supposed tension between Western and Asian perspectives on human rights. I evaluate the three main dichotomies in the debates:

<sup>3</sup> 3 ALL MALAY. REP. 693 (2007) at 715 [13] (F.C.),

<sup>4</sup> *Lina Joy*, 2 MALAY. L. J. 119 (2004), at 126 [10] (H.C.).

<sup>5</sup> This narrow approach to constitutional interpretation is based on a tendency to view interpretation as an insular mechanism contained within the “four walls” of the domestic constitution without reference to international principles. This “four walls” approach was first articulated in *Gov’t of Kelantan v Gov’t of Malaya* 1 MALAY. L. J. 355, 359 (1963) (Thomson C.J.) (“[The Constitution] is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries, such as Great Britain, the United States of America or Australia.”).

<sup>6</sup> *Raja Petra, Teresa Kok and Sin Chew reporter arrested under ISA*, STAR (MALAY.), Sept. 13, 2008, <http://thestar.com.my/news/story.asp?file=/2008/9/13/nation/2022362&sec=nation>.

<sup>7</sup> The government detained 106 persons, chiefly made up of those critical of the government, under *Operasi Lalang*, an internal security operation carried out in 1987 when Prime Minister Mahathir Mohamad was in power. Although *Operasi Lalang* was more widespread than this 2008 instance, the Home Minister uses similar rhetoric. On the Malaysian Internal Security Act generally, see RAIS YATIM, FREEDOM UNDER EXECUTIVE POWER IN MALAYSIA (1995).

<sup>8</sup> *Raja Petra, Teresa Kok and Sin Chew reporter arrested under ISA*, *supra* note 8.

<sup>9</sup> *PM announces repeal of ISA, three Emergency proclamations*, STAR (MALAY.), Sept. 15, 2011, <http://thestar.com.my/news/story.asp?file=/2011/9/15/nation/20110915205714&sec=nation>.

<sup>10</sup> MALIK IMTIAZ, *The Death of Civil Liberties*, EDGE (MALAY.), Apr. 19, 2012, available at <http://malikimtiaz.blogspot.co.uk/2012/04/death-of-civil-liberties.html>.

universalism versus relativism; individualism versus communitarianism; and, civil-political rights versus economic-social rights. I argue that these supposed dichotomies are false, unhelpful, and frequently obscure more than they illuminate.

### *Universalism versus relativism*

The first dichotomy between Western and Asian perspectives on rights is the supposed divide over whether rights are universal or culturally relative. One account views human rights as universally applicable to all human beings indiscriminately. Universalists view rights as natural concepts held simply by virtue of being human,<sup>11</sup> or — the deliberative school of thought — as political values that come into existence through societal consensus and legitimisation.<sup>12</sup> According to this view, human rights apply to all human beings everywhere, no matter which state or which culture one is from.

Cultural relativism emerged as a reaction to the universal rights model. Relativists challenge the concept that rights are universal, arguing that rights are dependent on cultural norms and that human rights are not universally valid because they are the product of Western norms or — in a subtler form of the argument — that human rights need to be appropriate for, and accepted in, specific local contexts in order to be politically legitimate.<sup>13</sup> The “Asian values” ideology is a main example of cultural relativity. Mahathir and Lee Kuan Yew viewed universal human rights as an alien imposition from the West, reflecting specific Western values, and argued for an approach based on “Asian values” instead.

I am sceptical about cultural relativism for at least three reasons. The first is that using *culture* as the basis for relativism is deeply flawed to begin with. It is neither accurate nor meaningful to speak of an overarching homogenous concept of “Asian values” for a region as diverse as Asia, where cultural and religious norms, political history, and economic conditions differ between countries — and sometimes even within states.<sup>14</sup> Besides differences based simply on ethnicity or religion, there are differences in culture between the different layers of *society* itself. Priorities and perceptions differ between the governmental elite and the public; between the urban middle class and the rural working class; between civil society activists and religious conservatives. Economic and social class are more important factors in determining one’s perceptions of rights than traditional “cultural” values.<sup>15</sup>

Second, a related, but distinct, issue is that material bases and the state’s political power influence the conception and protection of rights more than culture.<sup>16</sup> Economic progress is immensely significant in developing countries, like Malaysia and Singapore, and a stronger driving value

<sup>11</sup> See, e.g., JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 74 (2003). These universalists conceive of rights as given in the tradition of theorists such as Voltaire and John Rawls. See JOHN RAWLS, A THEORY OF JUSTICE (1971).

<sup>12</sup> Examples of scholars in this category include MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY (2003); TOM CAMPBELL, RIGHTS: A CRITICAL INTRODUCTION (2006); Yash Ghai, *Ch 3*, in HUMAN RIGHTS, SOUTHERN VOICES 36, 104 (W. Twining ed., 2009) [hereinafter SOUTHERN VOICES] (although Ghai believes such classifications are unhelpful in explaining his work, see *id.* at 219); SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 221 (2006).

<sup>13</sup> The American Anthropological Association’s statement in response to the Universal Declaration of Human Rights (UDHR) is an example of one of the earliest formulations of the position on legitimacy of rights. See American Anthropological Association, *Statement on Human Rights*, in 49 AMERICAN ANTHROPOLOGIST 539, 543 (1947) (“The rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single culture . . .”).

<sup>14</sup> Russell J. Dalton & Nhu-Ngoc T. Ong, *Authority Orientations and Democratic Attitudes: A Test of the “Asian Values” Hypothesis*, 6(2) JAP. J. POL. SCI. 1, 20 (2005).

<sup>15</sup> Yash Ghai, *Ch 3*, in HUMAN RIGHTS, SOUTHERN VOICES (W. Twining ed., 2009), at 113-14.

<sup>16</sup> *Id.* at 114.

behind government policies than culture or “Asian values”.<sup>17</sup> The ruling parties’ apathy toward rights protection in Malaysia and Singapore and the authoritarian method of governance employed result from the executive’s continued monopoly of political power since independence, rather than a commitment to specific cultural values.

Second, the cultural diversity, both ethnic and religious, across countries in Asia and even *within* countries themselves makes it difficult to claim that there is a single homogenous “culture” for a region as diverse as Asia. Besides differences based simply on ethnicity or religion, there are differences in culture between the different layers of *society* itself. Priorities and perceptions differ between the governmental elite and the public; between the urban middle class and the working class; between civil society activists and religious conservatives. Economic and social class are more important factors in determining one’s perception of rights as compared to traditional “cultural” values.<sup>18</sup>

Third, relativists themselves lack clarity in using relativism as a conceptual argument. Emphasizing “Asian values”, such as the importance of family and community, does not preclude a society from acknowledging other “Western” rights-related values. If the argument is simply that some values are given greater priority than others, this is a matter of balancing competing values — an exercise commonly carried out in Western countries, for example through the concept of proportionality in the United Kingdom as an influence of the European Convention of Human Rights.<sup>19</sup> This does not mean that values are relative from one culture to another; many Western European countries, for instance, are committed both to social discipline and liberal rights.<sup>20</sup>

#### *Individualism versus communitarianism*

The second theme that emerges from the polemic between Western and non-Western human rights perspectives engages with the idea of individualism versus communitarianism. The supposed contrast between Western and Asian models of human rights lies in the perceived priority of the Western approach on an individual’s rights against society; by contrast, the Asian approach emphasises socio-political stability and duties over the rights of the individual.<sup>21</sup>

The “Asian values” prong, which gained prominence in the 1990s in Southeast Asia, attempts to carve out its own “distinctive approach to human development and state-community individual relations” as “superior to the individualistic, rights-oriented Western democracies.”<sup>22</sup> While there are some local particularities to the different models of “Asian values” in various Asia Pacific countries, all variations have a strong emphasis on neo-conservative communitarian values and social order, and is frequently used to justify state intervention.<sup>23</sup> In the words of Lee Kuan Yew: “Asia has never valued the individual over society. The society has always been more important than the individual.”<sup>24</sup>

<sup>17</sup> Laurence Wai-Teng Leong, *From “Asian Values” to Singapore Exceptionalism*, in HUMAN RIGHTS IN ASIA: A REASSESSMENT OF THE ASIAN VALUES DEBATE 134 (L. Avonius & D. Kingsbury eds., 2008).

<sup>18</sup> Yash Ghai, *Ch 3*, in HUMAN RIGHTS, SOUTHERN VOICES (W. Twining ed., 2009), at 113-14.

<sup>19</sup> See, generally, H.W.R. WADE & C.F. FORSYTH, ADMINISTRATIVE LAW, 305-14 (10<sup>th</sup> ed., 2009).

<sup>20</sup> Michael Freeman, *Human rights, democracy and ‘Asian values’*, PACIFIC REV. 352, 356 (1996).

<sup>21</sup> See DONNELLY, *supra* note 14, at 107-123. See also Li-Ann Thio, *Implementing Human Rights in ASEAN Countries: Promises to keep and miles to go before I sleep*, 2 YALE HUM. RTS. AND DEV. L. J. 1, 13-22 (1999)

<sup>22</sup> Thio, *id.*, at 22.

<sup>23</sup> Michael Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 128 (1998).

<sup>24</sup> Sandra Burton, *Society vs The Individual*, TIME, June 14, 1993, at 20-21.

Again I argue that this dichotomy is conceptually flawed. First, it is artificial to ascribe rights-related values as Western and community-related values as Asian. Values related to order and the importance of the family or community are not important only to Asian communities. The debate between the priority placed on societal order versus individual rights is also a source of tension between the conservatives and liberals in the West. Emphasis on individualism also varies according to different Western political cultures. The United States, for instance, has a greater emphasis on individualism compared to other Western European countries.<sup>25</sup>

Second, I am sceptical of the claim that “Asian values”, with its priority on the society over the individual, is necessary to ensure community and political stability. Taking away from individual liberties does not necessarily lead to an increase in community stability. Indeed, I argue that an *inverse* relation between prioritising the rights of the individual and social tension more accurately depicts the challenges of dealing with a multicultural and multireligious society. An approach that focuses on community rights, rather than an individual’s right, inevitably runs into sensitive issues of appearing to prefer one community’s rights over the others. The tension between the Malay-Muslim community and the non-Muslim community in Malaysia over the *Lina Joy* decision on apostasy illustrates this.<sup>26</sup>

#### *Economic priority and “Asian values”*

The emergence of the “Asian values” paradigm is closely linked to the economic success of Southeast Asia in the 1990s before the 1997 Asian financial crisis. The main thrust of the economic priority argument made by Asian states is that economic development must be given precedence over civil and political rights. Developing countries argue that they cannot afford the “luxury” of civil and political rights which developed countries can because of their economic prosperity. Governments in Malaysia, Singapore and China argue that economic development is the main priority for developing countries, and that strong authoritarian governance is needed in order to steer their countries in this direction.

This debate is frequently framed as a tension between economic and social rights versus civil and political rights, with Asian states prioritising the former and Western states prioritising the latter. I am sceptical with this framing of the debate. First, such a dichotomy presupposes an entirely economic and narrow definition of development. Nobel Laureate Amartya Sen shows that that “development involves much more than mere economic growth.”<sup>27</sup> Development must be understood as a “process of expanding the real freedoms that people enjoy” and human rights are a constituent element of this.<sup>28</sup> To approach economic and social rights as separate from civil and political rights is based on the misunderstanding that both sets of rights are mutually exclusive and that priority must be given to one *at the expense* of the other. This view is blinkered: “economic and civil liberties are inter-related and inter-dependent.”<sup>29</sup>

Second, the emphasis of developing countries is really on economic *priority*, in terms of GDP growth or output, rather than on the *fair* distribution of economic *opportunities* to all individuals.<sup>30</sup> This dimension is highlighted by the constitutionally protected privileges of the Malay ethnic *majority* in Malaysia.<sup>31</sup> This is used as the basis of a national economic policy that effectively forms

<sup>25</sup> Michael Freeman, *Human Rights, democracy and ‘Asian values’*, PACIFIC REV. 352 (1996), at 355.

<sup>26</sup> *Lina Joy*, 3 ALL MALAY. REP. 693.

<sup>27</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM, 93 (1999).

<sup>28</sup> *Id.* at 3 (1999).

<sup>29</sup> Michael Kirby, *Human Rights and Economic Development*, 22 JOURNAL OF MAL. & COMP. L. 1, 16 (1995).

<sup>30</sup> JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 111 (2003).

<sup>31</sup> FED. CONST. (MALAY.), art 153.

an affirmative action regime in favour of the majority Malay group for government positions, scholarships, business contracts and so forth – a policy that has caused increasing resentment among other communities and “reinforces ethnic and class communities”.<sup>32</sup> The Chinese, Indians, and other ethnic minorities do not receive an equal distribution of such rights, raising the question of whether economic and social opportunities are indeed available for *all* citizens.

### 3. Beyond “Asian Values”: Reassessment of the Themes

The second part of this paper reassesses the themes identified in the first part of this paper in light of developments since the 1990s in human rights discourse. In particular, I look at whether — and to what extent — there has been a movement away from the “Asian values” approach after the 1997 Asian financial crisis.

The discourse on human rights in Asia has both an *external* and an *internal* component. The *external* component refers to the “Asian values” debate as part of the international human rights discourse on theories of rights protection and economic development. I reassess the external contribution of “Asian values” to the international dialogue after the 1997 financial crisis: how have the debates surrounding universalism and relativism evolved since the 1990s and in what direction is the current international human rights discourse heading?

The *internal* component, which is distinguished from the external debates regarding human rights, relates to the immediate and practical issue of whether remnants of the “Asian values” ideology continues to have an impact internally *within* the Asian states. In this section, I assess whether “Asian values” continues to have an influence domestically within societies in the countries that were particularly forceful in propagating the ideology like Malaysia and Singapore.

#### *External and Internal approaches to “Asian values”*

Externally, on an international level, the “Asian values” approach has evolved through several stages.<sup>33</sup> The concept of “Asian values” first emerged on the international human rights discourse in the 1990s in a highly political manner. The term was conceived by Singapore’s Lee Kuan Yew and Malaysia’s Mahathir Mohammad, gained momentum through China’s White Paper on Human Rights in 1991, and achieved the support of other Association of Southeast Asian Nations (ASEAN) states in the 1993 ASEAN Bangkok Declaration. The debates on “Asian values” at this stage were heavily politicised and polemic, with “Western” universalists and “Asian” cultural relativists having diametrically polarised points of view. The 1997 Asian financial crisis dealt a crippling blow to Southeast Asian states that had previously argued “from a position of economic and social success.”<sup>34</sup>

Despite pronouncements by detractors of “Asian values” that the debate was over,<sup>35</sup> a second wave to the “Asian values” debate arose after the 1997 crisis. In this second stage, the discourse was no longer dominated by politicians, but by scholars. As a result, the debates became less

<sup>32</sup> Ghai, in TWINING ED., at 143. *Bumiputera*, literally translated, means “sons of the land”. It is used to refer to the Malays, who form the ethnic majority group, and other indigenous ethnic groups, such as the *Orang Asli*, Ibans, Kadazans, etc.

<sup>33</sup> For discussion of the various rounds of the “Asian values” debate, see Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates about “Values in Asia”*, 14 IND. INT’L & COMP. L. REV. 1 (2003-2004).

<sup>34</sup> *Competitive Order*, ECONOMIST, Feb 15, 1992, at 58-59.

<sup>35</sup> See, e.g., Francis Fukuyama, *Asian Values in the Wake of the Asian Crisis*, in DEMOCRACY, MARKET ECONOMICS & DEVELOPMENT: AN ASIAN PERSPECTIVE 151 (F. Iqbal & J. You eds, 2001) (“Since few people today seem to be interested in making the case for Asian values...criticizing the concept may seem a bit like beating a dead horse.”).



politicised and more academic.<sup>36</sup> The “Asian values” debate moved beyond sharp dichotomies, such as universalism versus relativism or individualism versus communitarianism, toward achieving more balanced viewpoints. There has been increasing recognition of the need to accommodate competing tensions by focusing on how to make rights more culturally legitimate and toward achieving cross-cultural global consensus on such rights.

So, what next for the Asian rights discourse? I believe that the “Asian values” concept is useful not because of any intrinsic substance but because of the gap that it highlights, although ultimately fails to fulfil: the lack in the international human rights discourse of a localised Asian perspective of rights.

I argue that the third and final stage, then, must be to develop a comprehensive theory that draws together the strands that have emerged from the discourse into a distinctive Asian model. As Peerenboom notes, “the debates over Asian values, Confucianism, and communitarian alternatives to liberalism have suffered from the lack of a systematic, coherent theory...”<sup>37</sup> The next stage should attempt to find a synthesized Asian model that attempts to accommodate these tensions in a politically sensitive manner for specific local contexts in Southeast Asia.

This *external* outward facing approach of Asian rights discourse should not be confused with the *internal* inward-looking impact of “Asian values” domestically. The internal approach to “Asian values” is inward-looking: focused on the internal experience of the Southeast Asian countries after the 1997 Asian financial crisis. Detractors of “Asian values” view the approach as internationally discredited after the financial crisis, but the separate question of whether this has undermined its internal domestic impact remains. Although “Asian values” is no longer a buzzword in the Southeast Asian region, I assess the extent to which remnants of the “Asian values” ideology continues to operate within the states that had been its strongest proponents—Malaysia and Singapore.

The continuing impact of the “Asian values” ideology needs to be distinguished according to its influence on two separate layers of society. The first layer of society encompasses actors responsible for shaping the state’s domestic policy: government leaders, politicians, and judges. The second layer consists of the public or the citizenry.

#### *Remnants of the “Asian Values” ideology: Two layers of society*

Remnants of the “Asian Values” ideology can still be found in Malaysia and Singapore in the institutions that constitute the first layer—the government and the courts. Although terms like cultural relativism and “Asian Values” are not used anymore, the ideology itself still remains: these governments remain extremely protective of their right to determine their own approach toward human rights and economic development.

In Malaysia, the spectre of the racial riots of May 13, 1969, and claims of national security continue to be invoked to justify the continued use of measures, such as the preventive detention law, which has been criticised for being abused to silence dissenters. The Home Minister’s defence of the 2008 arrests, discussed above, of an Opposition politician, journalist and online newspaper editor, bears traces of the Mahathir Model ideology that “societal unity” must be prioritised at all costs,<sup>38</sup> and that “we do not want anything that can threaten peace in the country.”<sup>39</sup>

<sup>36</sup> Peerenboom, *supra* note 33, at 52.

<sup>37</sup> *Id.* at 84.

<sup>38</sup> *Operasi Lalang*, an internal security operation, was carried out under then Prime Minister Mahathir Mohamad in 1987, where 106 persons, chiefly comprising those critical of the government, were detained.

The “1Malaysia” concept of the current Prime Minister, Najib Razak, with its emphasis on unity and mutual respect, also remains very much in line with the Mahathir Model’s emphasis on social order and economic progress. Prime Minister Najib himself stressed that 1Malaysia was “not a new concept” and that its “ultimate objective of national unity was the main vision of past leaders”.<sup>40</sup> The continued emphasis on economic development is also clear in the 1Malaysia concept: Najib called 1Malaysia a “continuation of the agenda of nation-building”<sup>41</sup> and has taken steps to liberalise the financial services sector by removing the previous requirement for companies to reserve at least 30% equity for Malay investors.

Najib’s 1Malaysia campaign has been criticised by Anwar Ibrahim, former Deputy Prime Minister and current Opposition figure, as a cosmetic attempt by the new premier to win back ethnic minority voters after the ruling party’s disappointing performance in the 2008 general elections.<sup>42</sup> Also, although Najib’s economic liberalisation is a step in the right direction, he has steered away from dealing with Malaysia’s clear economic elephant in the room: the affirmative action policy for the *bumiputera* majority.<sup>43</sup>

Across the border from Malaysia, Singapore exhibits characteristics that have been called an “‘Asian values’ redux.”<sup>44</sup> The key principles of the “Asian values” approach—its emphasis on cultural determinism, social order, and a restrictive approach to liberal rights—are present in a “different format”.<sup>45</sup> Lawrence Leong uses the term “Singapore Exceptionalism”, adapted from the concept of “American Exceptionalism”, to describe the ruling elite’s prevailing view that Singapore’s unique circumstances and economic success allows it to determine its own method of governance and its approach to international human rights standards.<sup>46</sup> The state continues to be fiercely defensive of its own view of what works for Singapore; the Ministry of Home Affairs was clear that “what works” is “stable, effective government”—not “any abstract ideal of liberal rights”.<sup>47</sup>

The courts in Malaysia and Singapore continue to be highly deferential toward the executive in matters relating to restrictions on fundamental liberties, despite the framework of constitutional—not parliamentary—supremacy. In *Chee Siok Chin v. Minister of Home Affairs*,<sup>48</sup> the Singapore High Court emphasised that “[s]tandards set down in one country cannot be blindly... and/or applied without a proper appreciation of context” because there are “greatly varying value judgments as to what may be tolerable or acceptable in different and diverse

<sup>39</sup> *Raja Petra, Teresa Kok and Sin Chew reporter arrested under ISA*, STAR (MALAYSIA), Sept, 13, 2008, <http://thestar.com.my/news/story.asp?file=/2008/9/13/nation/2022362&sec=nation>

<sup>40</sup> Bernama, *National unity ultimate objective of 1Malaysia, says Najib*, BERNAMA, June 15, 2009, [http://www.bernama.com/bernama/v3/news\\_lite.php?id=418020](http://www.bernama.com/bernama/v3/news_lite.php?id=418020).

<sup>41</sup> *Id.*

<sup>42</sup> *Anwar trains his sights on 1Malaysia*, MALAY. INSIDER, Apr. 30, 2009, <http://anwaribrahimblog.com/2009/04/30/anwar-trains-his-sights-on-1malaysia>.

<sup>43</sup> *PM: Affirmative action a vital component in new economic reality*, STAR (MALAY.), <http://thestar.com.my/news/story.asp?file=/2010/3/31/neweconomicmodel/5968462&sec=neweconomicmodel>.

<sup>44</sup> Laurence Wai-Teng Leong, *From “Asian Values” to Singapore Exceptionalism*, in *HUMAN RIGHTS IN ASIA: A REASSESSMENT OF THE ASIAN VALUES DEBATE* (L. Avonius & D. Kingsbury eds., 2008), at 132.

<sup>45</sup> *Id.*, at 126. Leong adapts this phrase from Michael Ignatieff’s “American Exceptionalism”, characterised by America’s: (1) exemptions under international human rights treaties; (2) double standards in judging itself and its allies; and (3) “legal isolationism”. See MICHAEL IGNATIEFF ED., *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* (2005).

<sup>46</sup> Leong *supra* note 44 at 126.

<sup>47</sup> Peck Wan Ong-Chew, Press Secretary, Ministry of Home Affairs, *On Human Rights: What Matters is What Works for Singapore*, STRAITS TIMES, Dec. 16, 2004.

<sup>48</sup> [2006] 1 S.L.R. 582 (H.C.).

societies.”<sup>49</sup> The experience of Malaysia and Singapore show that while the “Asian values” thesis may have been dismissed internationally, its internal impact from both the executive and judiciary should not be underestimated.

*Second layer of society: Who speaks for whom?*

The political elite and the adjudicators — the first layer of society — continue to perpetuate familiar claims that societal and economic stability necessarily require priority over individuals. But to what extent do these claims legitimately represent the position of the people who make up the other layer of society? During the 1990s, rapid economic growth and strong leadership under Mahathir and Lee Kuan Yew led many citizens to accept “the government’s claims that the rights of the individual were incompatible with, and secondary to, community interests.”<sup>50</sup> This has changed over the past decade. Political participation among the second layer of society has increased, particularly in Malaysia.

The controversial sacking of Anwar Ibrahim as Deputy Prime Minister, and his subsequent detention and trial for alleged sodomy charges, was a key event in politicising the middle class in Malaysia. The growth of new media, such as online independent news portals, blogs, and Twitter, has also played an immense role in the articulation of dissatisfaction with the status quo and mainstream media. These factors culminated in an unprecedented outcome in the March 2008 general elections when the National Front ruling coalition lost its two-third parliamentary majority and lost five out of the thirteen state governments to the Opposition coalition led by Anwar Ibrahim.<sup>51</sup>

The changing face of the second layer of society in Malaysia and Singapore — more revolutionary in the former and evolutionary in the latter — throws the two layers of society into stark contrast: it has become increasingly clear that it is no longer easy for the ruling elite to claim that it speaks for society as a whole. The political reality of the 21<sup>st</sup> century requires a more legitimate and developed theory of constitutional adjudication that acknowledges the voices of the second layer of society.

#### 4. Conclusion

The external and internal approaches point towards the need for a more developed and nuanced model of rights protection for Malaysia, which moves beyond the remnants of the “Asian values” ideology but which remains firmly locally contextualised. In conclusion, I advance three main theses regarding the direction in which an inclusive model of human rights for Asia should move.

First, the way forward for a contextual Asian model is to build on cross-cultural theories of human rights.<sup>52</sup> Approaches like Abdullah An-Na’im’s that focus on broadening universal consensus of rights through cross-cultural dialogue are realistic in recognising that rights require political

<sup>49</sup> *Id.* at para 132.

<sup>50</sup> Amnesty International, *Malaysia – Human rights undermined: restrictive laws in a parliamentary democracy*, ASA 28/06/99.

<sup>51</sup> The Opposition coalition is made up of the *Parti Keadilan Rakyat* (PKR), the Democratic Action Party (DAP), and the *Parti Se-Islam Malaysia* (PAS).

<sup>52</sup> See Abdullah An-Na’im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES 19 (Abdullah An-Na’im ed., 1995); Onumo Yasuaki, *Toward an Intercivilizational Approach to Human Rights*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 241, 249 (J.R. Bauer & D. A. Bell eds., 1999), at 103-123.

legitimacy to be accepted in different cultural contexts.<sup>53</sup> But while intercultural approaches should form the foundation on which rights protection in Southeast Asia should be based, I believe in going further than An-Na'im. The problem with An-Na'im's focus on cultural legitimation through dialogue, even for existing international human rights standards, is it follows that cross-cultural analysis may lead to these standards being revised.<sup>54</sup> I argue that there is a sufficient cultural legitimation of international standards, such as the Universal Declaration of Human Rights, for certain core human rights to be regarded as universal because of the common consensus surrounding them.

Second, we need to be sceptical of framing tensions between supposed competing interests—and that we should move beyond such dichotomies definitively. The suggestion that an individual's autonomy has always to be balanced against the society's need for protection against the harms of such liberties requires scrutiny. The individual-community dichotomy can also be framed as a balance between liberty and security—an image that has become increasingly topical in the West after September 11, 2001. Jeremy Waldron challenges this perceived “balance” and argues that detracting from one does not necessarily enhance the other—so, a diminution in liberty may not in fact have the desired consequence of an increase in security.<sup>55</sup> Indeed, I argue that prioritising communitarian concerns to maintain social cohesion by adopting a restrictive approach to individual liberties frequently leads to inverse effects for social stability. Decisions like *Lina Joy*,<sup>56</sup> with its emphasis on the group concerns of the Muslim community rather than the individual's right to religious freedom, ultimately results in increased polarization between the Muslim and non-Muslim communities in Malaysia.

My third, and final, thesis is that a rights-based approach should be constructed in a manner that is specifically sensitive to the local context for which it is meant to apply. This is so that the model is uniquely tailored to take into account the specific circumstances that Asian governments claim pose different challenges from Western states. Such a model needs to be developed from the Asian perspective in order to be able to substantiate its claim that it is developed *for* Asian contexts and to avoid post-colonial governments sensitive to any suggestion of neo-imperialism perceiving it as simply another form of Western imposition.<sup>57</sup> Such an approach needs to be culturally *sensitive*—but not culturally relative. In moving beyond the “Asian values” approach, a more nuanced and politically realistic model of rights protection is needed for these countries to function as an internal constitutional framework.

Development of these strands in a careful and thoughtful manner into a balanced conceptualisation of rights from an Asian perspective will be a significant step forward in advancing rights protection in Malaysia and Singapore. The “Asian values” ideology is theoretically unfounded and politically outmoded. It is time for a fresh perspective and definitive move toward a more sophisticated model that can better encapsulate contemporary political realities and guide a more sensitive balancing of interests in regional human rights protection.

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<sup>53</sup> An-Na'im, *id.*, at 21.

<sup>54</sup> An-Na'im, *Introduction, id.*, at 5.

<sup>55</sup> Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191-219, 208 (2003).

<sup>56</sup> 3 ALL MALAY. REP. 693 (2007).

<sup>57</sup> Yasuaki, *supra* note 52, at 105.

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