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Lesson Learned for ASEAN from the Integration of Human Rights in the European Union (The EU)

Rachminawati[1]

Human rights are one of the EU's tools to integrate its member states as well as its citizens. The integration of human rights into EU law and policy build the concept of "the new EU" which is to establish "economic space" together with the space of liberty, justice and security which is implemented in the third pillar of the Maastricht Treaty .EU experience shows that the integration of human rights into their law and policy not only enhance the protection of human rights and democratic legitimacy but also economic, social welfare and peaceful life. Integration of human rights demonstrates the possibility of a plural nation which have a background of century-old conflicts to become one strong institution.

The EU and ASEAN follow a similar path of regional integration. The success of the EU integration includes human rights integration and has made the EU a model for ASEAN integration. Despite, their differences, the ASEAN can learn the positive contribution of integrating human rights in the EU as the ASEAN is moving from economic cooperation to other related areas including human rights through ASEAN Community in 2015.

Keywords: ASEAN, Human Rights, European Union

I. Introduction

Human rights issues were overlooked when the EU was first established. The EU's concern at that particular time was merely economic, but as it progressed, human rights have received more central attention. Human rights evolved especially in terms of the European integration process. The of human rights is one of the EU's tools to integrate its member states as well as its citizens. As The EU and ASEAN follow a similar path of regional integration, this thesis argues that the EU can be a model for ASEAN in integrating human rights values into its law and policies to enhance and reach its aims and objectives which are a single market and a customised union among its member states.

There are many debates as to whether ASEAN can 'imitate' Europe

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with respect to the protection of human rights. Arguably it is the debate between universalism and particularism of human rights. Ariola (2004) states in his book that there is a debate between governmental and non-governmental bodies in Asia. Governments bring the idea of 'ASEAN values' rather than 'universal values'. Non-governmental organisations strongly disagreed on this. They argued that the state elite used 'culture' as a means to maintain its political power.

The importance of this research lies in its contribution to the study of the EU, especially in the field of human rights. The relevance of human rights are analysed in the EU integration, how they are integrated into EU law and policies, and furthermore accelerate the EU in achieving its aims, generated by the development of human rights internally (within the EU) and externally (in international world order) that could possibly be a model for other regional organisations including ASEAN.

II. The Origin of the EU's Human Rights Law and Policy

Human rights were overlooked in the beginning of the EU's establishment. The treaties establishing the EU (at that time, the European Communities – The EC) did not contain any specific provision on human rights (Neuwahl, 1995; Schimmelfennig and Schwellnus, 2006). The EU's concern at that time was merely economic (Petersmann, 2002; Neuwahl, 1995). In line with Petersman and Neuwahl, in Schlink (1996, p. 318) it has been emphasised that the human rights were not designed on a legal basis in the organisation because the EU was mainly an 'economic' organisation. Therefore, the EU did not have the competence to resolve the problems of human rights.

Furthermore, I shall illustrate what to me seems a paradox of the constituting phase: rights without constitution. In the context of the EU, the EU did not have a constitution which guaranteed human rights but then they integrate human rights into their law and policy. Therefore, I would like to describe two different views for the reasons why human rights should or should not be integrated in the EU laws and policy.

Levi analysed that the protection of fundamental rights in Europe were guaranteed by the states and were considered adequate. The founding fathers of the EU did not include human rights because they were of the opinion that all EU's members have already committed themselves to all

with respect to the protection of human rights. Arguably it is the debate between universalism and particularism of human rights. Ariola (2004) states in his book that there is a debate between governmental and non-governmental bodies in Asia. Governments bring the idea of 'ASEAN values' rather than 'universal values'. Non-governmental organisations strongly disagreed on this. They argued that the state elite used 'culture' as a means to maintain its political power.

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Levi analysed that the protection of fundamental rights in Europe were guaranteed by the states and were considered adequate. The founding fathers of the EU did not include human rights because they were of the opinion that all EU's members have already committed themselves to all

international and regional human rights convention such as the Universal Declaration on Human Rights (UDHR), the European Convention on Human Rights (ECHR), the International Labour Organisation (ILO) Conventions and other related human rights conventions (El-Agraa, 2008; William, 2004, p. 137). Therefore, it is no doubt that the EU through their members incorporated human rights indirectly, since human rights have already been placed in the heart of the EU member states.

In contrast, Weiler gives another reason that, because the Court, in its decision in Opinion 2/94 that the protection of human rights was not one of the policy objectives of the community, thus the protection of human rights seemed inactive. Patrick Twoney in William (2004, p. 138) argued that the original silence of the EU on human rights was not surprising; the Community was indeed originally economic in character. William himself concluded that the absence of human rights from the originating treaties was because the Community was a power driven institution and, at that time, the original member states were unwilling to have human rights arrangement in the EU.

As a result, El-Agraa (2008) argued that the absence of human rights opened possibilities that the EU could infringe on people's rights. Wailer (2000) notices that there was a lack of concern of institutionalised human rights as it is shown by the absence of a Commissioner, Directorate-General, and special budgets for human rights. However, in contrast, the EU tried to include more rights through Court decision or their external policy. Therefore, at that time (before 2000), he suggested the EU did not add more rights on the list of rights because the most important thing was that the EU should institutionalise human rights to be able to enforce it. Weiler also noticed that the judgement of the Court was not sufficient to enforce those rights. How the Court enforces these rights into case settlements will be discussed in the next session.

As time progressed, human rights were received with more central attention in the EU (Petersmann, 2002; Levi, 2007; El-Agraa, 2008). Human rights started to be integrated in the early 1970s through European Court of Justice (ECJ) decisions in some cases. The Single European Act (SEA) 1986 sets human rights to have an important place in the treaties. However, the implementation of human rights has met varying degrees of success on one side and resistance and hostility from various member states on another.

Alston and Weiler (1999) also stated that the situation in the EU significantly changed in the beginning of the 20th century. They argued that the EU was becoming 'ever closer' through the single market, single currency, and the imminent prospect of a greatly enlarged union. These changes had a huge implication on human rights which were insufficient if only because they were relying upon the 'peace' concept that the EU had. The consent of each member of the EU was also insufficient to cover all human rights problems that existed after the opening of the single market. Schlink (1996, p.319) gave his opinion that the establishment of single market supplemented the community competencies with an additional number of specific powers which amongst others, included human rights.

Neuwahl (1995) also notices that there was a movement from an 'economic constitution' to a 'political constitution' since the adoption of the EU treaty. In this new treaty, human rights become the core issue. Neuwahl believes that human rights are the 'key notion' for a democratic organisation which is based on rule of law. The drafters of the treaty were also fully aware of the importance of human rights to be integrated in the EU law and policy. It can be shown in the article 6(1) (ex article F.1) TEU establishes that the EU "is founded on the principle of liberty, democracy, respect for human rights and fundamental freedoms and of the rule of law". Furthermore article F(2) TEU also states that:

"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community law".

Furthermore, the EU Charter of Fundamental Rights proved the high commitment of the EU in respect of human rights. In the preamble of the Charter, it states that "conscious of its spiritual and moral heritage, the union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity". This was a significant change from its original treaty, as presently human rights set its place in the 'heart' of the EU. Now, we could say that the EU already provides the important statements of a constitution in the Charter. William argued that it is a late attempt to set in text all those precepts that have purportedly governed the Community throughout its existence. But I would argue that the adoption of the Charter of Fundamental Rights in 2000 does not mean that the EU begins to be concerned of

human rights at that time the Charter was adopted. In spite of showing more concern for human rights, the establishment of the Charter is aimed to constitute the rights itself.

The adoption of the Charter in this respect shows clearly that the EU affirms to integrate human rights into their law and policy more seriously. Neuwahl gives some reasons in this regard. In his book, I conclude that there are at least four reasons for this, which are:

1. The evolution of the community's legal order and the growth activity of the institutions, people's daily lives are more and more affected by community law; rights of individual are increasingly at issue and more and more different human rights can become threatened.
2. Human rights have become more relevant because of the creation of single market, the abolition of frontier controls within the Community and the concomitant intensification of controls at its external borders and also within Member states: "social dimension" of market integration which a national legislator alone is insufficiently equipped to solve.
3. European Identity is now based on the protection of human rights, since Europe has a history of violation of human rights.
4. An adequate protection of human rights strengthens the community in relation with its member states. The protection to human rights is a main obligation which all the member states agree upon themselves. It can be seen by the rejection of community law which is not in line or breaching human rights principles such as by the German and Italian Courts.

Another important issue which relates to the increasing relevance of human rights is the enlargement of the EU. The enlargement of the EU causes problems internally and externally. Internally, the EU faces the challenge of the unification of all Europe. The addition of new members of the EU makes the EU more diverse on many aspects. For example, in terms of the legal system, now there are at least three legal systems that exist: Common Law, European Continental Law, and ex communist states' law. On this matter, Levi argues that the EU should be strengthening its institution, and if it does not, the EU is at risk of losing its political consistency and can become diluted into a large free trade zone.

Externally, this is related to EU neighbourhoods as well as to other states in the world. In addition to that, Williams (2004, p.3) argued that

"human rights are both peculiar to the community and of more applicability." The European continent is the forerunner in the development of human rights through the Council of Europe (CoE) with the ECHR, and the EU with the Charter of Fundamental Rights and other related human rights instruments.

The Charter of Fundamental Rights was established as a solution to those problems deriving from the integration of the union and its institutions. Levi (2007) argues that in the economic unification such as in the EU, a new European civil society has developed with its own conflict of economic interest and consequential violation of rights such as clandestine immigration, international organised crime and others which cannot be addressed by only one state.

In contrast, William argues that human rights were only a tool to authenticate the existence of the EU. Human rights are also used to impose humanitarian aspects of institutions and simultaneously applied to reach the aim. Even though he sharply criticises the EU with its double standard of rights, he later admits in his book that human rights also play an important factor in the EU's integration process.

Levi (2007) interprets the Charter as "the expression of a process of constituting the EU, of the transition from a union of states based on single market and single currency to a union of citizens based on human rights". In line with Levi, I would argue that human rights in the EU became significantly important because of its role in overcoming the crisis with economic integration as well as its enlargement. Simultaneously, integrating human rights will enhance the protection and fulfilment of citizen's rights. In recent times, respect for human rights can be considered one of the core sources of the EU law and policies stemming from it.

Human rights evolved because of the European integration process. Human rights are one of the EU's tools to integrate its member states as well as its citizens. Candidate states who want to join the EU should fulfil and protect the basic rights of their citizens. If they cannot, their accession to the EU will be refused. Turkey is one of the examples of how this works.

Human rights unite a diverse Europe because human rights are universal (Levi, p.96). There are indeed many differences between one state and another in the EU, but having a similar background in terms of a human rights track record made them realise that they have to be 'one voice' in the promotion and fulfilment of human rights.

III. Human Rights and Market Integration: Assessing the Role of the ECJ

Human rights are closely related to market integration. Petersmann argues that there is a transformation from 'market freedom' to 'fundamental rights'. Therefore, it makes sense that the EU moves from solely economic concerns to a more multidimensional approach, which includes human rights.

Market and human rights are indispensable and inter-dependent in the way they work. The creation of the EU's common market has lots of consequences in the human rights field: for example, the free movement of goods, people and capital create the right of property, work or establishment, movement, social security, and others (Howse, 2002). Another example is when states have a great economic value; states can fulfil the economic rights of their citizens by giving them free access to health services, education and housing. In contrast when states have low economic values, it is very hard for states to fulfil economic rights of their citizens.

It concludes that the establishment of human rights concern in the beginning was stimulated by the issue of citizen's economic rights which the remarkable work carried out by the ECJ through the case law who integrates human rights 'informally' into the EU until it became part of the EU law and therefore has a legal binding effect. Schlink (1996, p.321) stated that the ECJ has a long tradition of judicial activism favouring European integration.

The ECJ started to integrate human rights in 1970 through some cases. From that time onwards, human rights had started to be integrated gradually into the EU law and policy. Neuwahl (1995, p.3) argues that the ECJ assumes full responsibility for ensuring the respect and fulfilment of human rights. Neuwahl also construes community law in light of fundamental rights. The ECJ is in the position to ensure a uniformed application of the law in the same way as it does with the European Community law in general. For all those reasons, a concern with human rights in the European Community is amply justified.

In the Stauder case, a case is about a decision of the commission who authorised member states to allow the sale of this particular product at reduced prices to certain categories of person in need. In order to prevent the abuse of this privilege by fraud, applicants had to produce certain documents, which in the German language version of the decision included their

identity cards. One of the recipients, who considered this requirement to be contrary to human dignity, challenged the validity of this requirement before a German administrative court. When this case was presented at the preliminary ruling, the ECJ denied a violation of human rights but the ECJ stated in an *orbiter dictum* that fundamental rights are enshrined in the general principles of Community law and protected by the Court. This is the first case in which ECJ used human rights as a basis of their decision. The absence of human rights in the treaty is not a problem at all since ECJ refers to general principles of Community law. Though the applicant did not win the case, at least, the ECJ had accepted human rights in the Community.

In the International Handelsgesellschaft case, the ECJ tried to put human rights as important matter and to have a 'special place' in the member states. In this case, the ECJ reaffirmed the Stauder case "fundamental rights are enshrined in the general principles of community law and protected by the Court'. Besides that, International Handelsgesellschaft case identified their primary source as the constitutional traditions of the member states.

The latter case is the Nold case, which introduces a secondary source: International treaties for the protection of human rights on which the member states are signatories. In this case, the ECJ reaffirms the importance of the constitution of the member states. ECJ would strike down any provisions of community legislation which were contrary to the fundamental rights protected by the constitution of the member states. Therefore, it clearly explained that the Community did not form their own rights but the member states did. ECJ often refers this explicitly to ECHR.

In the development, the ECJ expands its concern to the level of member states by ensuring that human rights are protected in the entire field of community law by the member states as well as the Wachauf case.

Neuwahl (1995, p.11) concludes that the case law of the ECJ in human rights field appears to be evolving.

"The review by the ECJ in compliance with human rights has developed from review of measures adopted by the Community institutions themselves (the second Nold case) to "review" of measures adopted by member states in implementing community measures, (Wachauf) and more recently to "review" measures adopted by the member states which, in one way or another, fall within the scope of community law (the ERT case). "the concern of human rights is recognised in the community, and the case law of

the ECJ is flourishing, even though there is neither bill of rights nor any general guarantee of fundamental rights in the Community treaties" (Neuwahl, 1995, p.11).

In relation to this, European as well as North American countries argue that human rights are universal in nature. European integration has proven that different nation-states can still be integrated and united by accepting certain common values like democracy, rule of law, basic liberties and free market economy as well as the promotion of human rights both at home and outside (Petersmann, 2002).

There are different arguments about why the EU finally integrates human rights into their law and policy. I would try to see that integration in connection to the economy as being emphasised by the EU at the beginning of the establishment. I would like to describe shortly two theories which are quite related to this integration, that are: constructivist theory and functional theory.

Adler (2002) argued that constructivist theory is the concept of cognitive development, to study "common values" and their dissemination. This is also the starting point of institutionalization of values that develop into cooperative behaviors in the international society. As part of International Relation theory, this theory studies the social relations among states and non-state entities as well.

This theory is lacking on how the values can be studied through positivist approaches. The study will be very subjective because norms and values depend much on the interaction of the people and therefore it will be different from one community to another.

Regarding human rights, it is nature in the way they develop and it is influenced by social, historical, moral element and conditions. Donnely (2003) argued that human rights are constitutive no less than regulative rules. Therefore, constructivist theory can be applied in this 'ideational' condition.

In line with Donnely, Chryssochou argued that constructivist theory of integration can be applied in this area of human rights as it attempts to incorporate 'human consciousnesses' and 'ideational factors' into the process of understanding social reality. It aims to "track norms from the social to the legal" (2009, P.112). He argues that the way of human rights is practised in the EU shows that it moves from social norm into legal norms. In this con-

text, this theory of integration shows how human rights have been incorporated in the EU integration process through case law, treaty and EU's policies.

Contradict to Chryssochou, in the context of the EU, the initial development of human rights which is driven by market integration, this theory cannot be applied appropriately. Human rights are not new idea and new common understanding in the EU. The integration of human rights in the EU was forced by the implication of the EU market integration. The aim is not to integrate the EU but more about the economic and security internally and externally (Guzzini and Leander in Wiessala, 2006, p.22). Wiessala (2006, p.22) also argued that Constructivist theory does not make substantive claims about the European integration. Risse in Wiessala (2006, p. 23) stressing that constructivist emphasis the complement rather than the substitute.

The other theory is known as functional theory. Petersmann (2000) argues that

"European integration confirms the insight of 'functional theories', for example, citizen-driven market integration can provide strong incentives for transforming 'market freedoms' into 'fundamental rights' which—if directly enforced by producers, investors, workers, traders and consumers through courts (as in the EC)—can reinforce and extend the protection of basic human rights (e.g. to liberty, property, food and health)".

Thus, it shows that the EU moves from economic and material concerns to other related issues including human rights. However, Howse (2002) strongly argues that it is not as simple as Petersmann's argument, where the relationship between market and human rights is very complicated.

Levi argued that European integration process was developed in according with the functionalist explanations. It can be shown that, for example, a strategy suggesting to start from the economy and to rely on the hypothesis according to which "politics will follow" or, "the reversing the famous general de Gaulle's formula "supply corps will follow". He argued that the states support this strategy because it has enabled them to proceed along the line of less resistance and to consign as far as possible into the future the issue of the transfer of sovereignty in favor of supranational institutions. As a result the states have progressively divested of their sovereignty. In this case, lies the main factor of the crisis of national and Euro-

pean institutions, therefore human rights is needed to overcome that crisis.

Based on the EU experience, I also agreed with Levi that functional theory is more applicable to reflect how human rights are integrated into this 'economic organisation'. Human rights in the EU exist as the consequences of market integration. Human rights and market integration are closely intertwined.

Human rights also play a role in the enlarging the Union. The Copenhagen Criteria for the candidate states include both economic and political conditions to be fulfilled. Economic criteria are about the establishment of the free market economy in the candidate states, whereas the political criteria are about the stability of institution guaranteeing human rights. The combination of these two highlights how the economic integration and democracy and human rights promotion go hand to hand with each other.

The conclusion of the EU Charter for the fundamental rights and freedoms –yet waiting to be ratified by all member states- is a very positive step to integrate economic and political rights into the supranational power of the Union and give them a binding effect over member states.

To conclude, according to Petersmann (2002), international organisations, including the EU, need to integrate human rights into their organisational law in order to be more integrated, and to this end, citizens can benefit from their rights. In his studies, he found out that there are three important lessons why and how human rights are needed to be integrated in the EU law. Firstly, the EU law and policy today are construed in conformity with the human rights which have already been recognised by member states. Secondly, by integrating human rights into the EU law and policy, it will increase the EU's common market and the protection of human rights. Thirdly, human rights also provide 'legitimacy and self-governance' in the EU.

The concept of "the new EU" is to establish "economic space" together with the space of liberty, justice and security which is implemented in the third pillar of the Maastricht Treaty. It also exists in order to extend the principle of rule of law at the European level (Levi, p. 85). To this end, the ECJ and other EU's institution shall put more effort to realize that concept mentioned.

The success to integrate human rights into the EU law and policy shall be the determining event for ensuring the future of the EU integration and

furthermore for the future of federalism of the Union (If the EU move towards federal state of Europe). Integration of human rights demonstrates the possibility of a plural nation which have a background of century-old conflicts become one strong institution with one voice.

IV. Lesson Learned for ASEAN from the Integration of Human Rights in the EU

The Association of Southeast Asian Nations (ASEAN) is the most prominent example of regionalism in Asia Pacific and is the most developed form of integration in the region (Cockerham, 2007).

ASEAN was founded by Indonesia, Malaysia, the Philippines, Singapore and Thailand. They were subsequently joined by Brunei, Cambodia, Laos, Myanmar (Burma) and Vietnam. The grouping has emphasized regional co-operation in the "three pillars" of security, socio-cultural and economic integration. The regional grouping has made the most progress in economic integration, aiming to create an ASEAN Economic Community (AEC) by 2020 [2015] (W. Sim, 2008).

The foundation of the AEC is the ASEAN Free Trade Area (AFTA), a common external preferential tariff scheme to promote the free flow of goods within ASEAN. The characteristic of the integration is merely on economic rather than politic or social cultural (W. Sim, 2008).

In ASEAN integration, national sovereignty and non-interference are the main principles. These principles remain existed until now as it's laid down in the ASEAN charter. Lay Hong Tan (2004) stated that these principles have stymied closer and deeper integration in ASEAN for three decades. Therefore the behavioral norms occupy more importance than formal rules and regulation. ASEAN Member States too often adopt a "me-first" attitude instead of looking for collective benefits (W. Sim, 2008). These principles and attitude are big obstacles for ASEAN to move towards the stable organization, a more rule based and people centered.

In 2007, ASEAN adopted the ASEAN Charter, the first binding instrument of the institution since 1967. The adoption of the Charter shows us that ASEAN aims is to be a more integrated organisation among its member states as the original aims of ASEAN mentioned in Bangkok Declaration which are to accelerate economic growth, promote regional

peace and stability, collaboration in many areas of development, for even closer cooperation among member states (ASEAN, 2007). The establishment of ASEAN charter is a milestone for ASEAN (Lay Hong Tan, 2004).

The Charter also opens up the possibility of having rule based human rights mechanism. As the impact from AEC, a properly established roles and rights for the citizen is also a necessity. Yet the ASEAN Charter contains no clear human rights mechanisms (W. Sim, 2008).

Despite economic agreements, human rights were a big concern during the drafting process of the Charter. Considering lots of human rights violations in South East Asian countries are taking place internally; and externally across countries among ASEAN member states; and the absence of any specific regional body which can settle or adjudge them, these issues are a definite problem for ASEAN to achieve its aims. Therefore the needs to corporate human rights values into their institution law and policy is necessary.

Article 14 of this Charter mentions an obligation for ASEAN to build human rights mechanism. The inclusion of this obligation into the charter which is a legally binding document is remarkable. Through this legally binding charter, human rights mechanism in ASEAN becomes a reality. This idea was brought by Eminent Person Group (EPG). EPG argued that the establishment of ASEAN human rights mechanism can develop and promote democracy, good governance and human rights in South East Asian regime (Aseanhrmech, 2007a). To this end, there is no choice for ASEAN to not integrate human rights values in their law and policy and shows to the world that ASEAN is committing to bring into reality what ASEAN agreed in Vienna Declaration 1993 to "establish an appropriate regional mechanism on human rights" (aseanhrmech, 2007b).

ASEAN Human Rights Working Group was established by ASEAN whose task was to establish intergovernmental human rights commission for ASEAN. The group proposed ASEAN human rights mechanism in 2000 to the ASEAN senior official, which consists of rules and principles, commission and court. This demonstrates that the idea to have binding mechanism of human rights is not new but it has long debated and lobbied. There are debates between stakeholders especially between states and non-governmental organisations whether ASEAN should have binding human rights mechanism or not. In response to this, it is argued that ASEAN should

have a legal binding mechanism which can enhance the protection of human rights in the region and also can accelerate the ASEAN integration (Aseanhrmech, 2007a). The need to have legally binding mechanism will be elaborated more in the next session.

Presently, the draft of human rights mechanism is in the process at the level of ministerial meeting. The Terms of Reference (ToR) for the High Level Panel (HLP) on an ASEAN Human Rights Body (AHRB) was approved by 41st ASEAN Ministerial Meeting in 21 July 2008. According to the ToR of AHRB, the high level panel shall draft the ToR of the ASEAN human rights body in conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms (ToR AHRB, 2008). The HLP also shall undertake consultation with the appropriate stakeholders in ASEAN.

National Human Rights Institutions (NHRIs) is one of a prominent stakeholder in this case. In respond to the TOR AHRB, NHRIs of Indonesia, Malaysia, Filipina and Thailand appreciate with the effort of ASEAN to establish AHRB. NHRIs suggest that AHRB should be an independent deliberative body that provides an effective level of promotion, protection and monitoring of human rights throughout the ASEAN region. NHRIs emphasised on the importance of both promotion and protection function.

In the HLP, debate over having 'soft' and 'hard' body was existed. Indonesia is the only one state sought more duties for the body. The other nine members did not want the body too powerful. This position finally brings HLP to the decision of having ASEAN Intergovernmental Commission on Human Rights (AICHR) in spite of supranational commission or even more court (Tansubhapol, 2009).

I realize that the idea of having legally binding human rights mechanism in ASEAN is still far and will have many critics from other stakeholders but there is no choice for ASEAN if they want to be the AEC in 2020. In another context but quite related to support the establishment of such mechanism, Lay Hong Tan (2004) argued that the existence of supra-national institution rather than an intergovernmental one would advance regional integration of ASEAN.

As stated and largely accepted by world community, human rights are universal. Every person in all parts of the world has rights and freedom which is guaranteed by government and other stakeholders include regional

organization such as ASEAN, the EU, and etc.

There are many debates over universalism and particularism of human rights in ASEAN. Ariola (2004) shows in his book the debate between governmental and non governmental bodies in Asia. Governments bring the idea of 'Asean values' rather than 'universal values'. Non-governmental organisations strongly disagree with this idea. They argue that state elite used "culture" (Asean values) as a means to maintain political power.

In relation to human rights in ASEAN, the concept of "Asean values" still exists. The debate over universalism and particularism of human rights in ASEAN seems never having an ending. Even after the establishment of the Charter which have mandate to build human rights body and mechanism, I often find out the resistances from member states defending their sovereignty and maintaining their 'Asean values' (Ruland, 2000). Indonesia is always in the forefront for having 'hard' human rights body and mechanism in ASEAN, while the other nine member states try to avoid. Most of Asean countries did not want to open themselves from other scrutinizes and 'intervention' (Tansubhapol, 2009).

Ruland (2000) define the ASEAN values as 'behavioral norms of ASEAN' which is characterized by an essentially personalistic, informal, non-contractual and little institutionalized style of politics in order to have social harmony and avoid confrontation.

This principle generates the conflict between universalism and particularism of human rights in ASEAN. Based on 'ASEAN values' the ASEAN leaders and member states confirmed themselves that they have their own human rights values which are different from those in Europe or other region in the world. Therefore, human rights approach in ASEAN also based on the characteristics mention above by Ruland. The state sovereignty and non- interference principle are also applied in human rights field as it is laid down in the TOR of AICHR. And these are the obstacles to universalize human rights and more over to have a legally binding mechanism and institution.

I would argue that particularism of human rights is legally accepted in international human rights regime, therefore states or regional organization can claim themselves of having particular human rights (Steiner, Alston, Goodman, 2008). Though that principle has laid on the TOR of AICHR, there is a misperception on defining particularism of human rights within

actors in ASEAN. Particularism of human rights does not mean the existence of different human rights in different states or region. It means that human rights values is universal in character but the implementation of those rights is different in every place depends on the social, cultural background and condition.

The ASEAN values which are declared by ASEAN leader should not defend the need of having legally binding mechanism and institution because without such mechanism, the enforcement of human rights in ASEAN region is only 'lip service'.

The establishment of ASEAN Charter gave an opportunity for ASEAN to have similar mechanism as the EU. The EU's experience offers three important lessons how human rights need to be integrated into the law of regional or international organization.

First is the recognition of human rights concept by all member states. Having all ASEAN member states are parties to international human rights instrument assumes that ASEAN member states have already a common understanding of human rights. But, in the way human rights develop in this region, ASEAN states confirmed that they have their own human rights perspectives. 'ASEAN way' or 'ASEAN values' is always the reason to avoid having the similar mechanism as the EU has. There is indeed development in this regard. Presently, some ASEAN leaders realize the importance of human rights to be as part as their law and policy. Therefore they agreed to establish human rights mechanism as stated in the Charter. But, they face difficulties whether they should have a legal binding mechanism or not. Most of member states still retain their 'old way' by refusing legal binding one. Learning from the EU with ECJ as an enforcer of citizen rights, through integrating human rights into ASEAN law and policy, the ASEAN people can pursue their self-development, peace and prosperity across frontiers.

Secondly is by integrating human rights into regional organization law, subsequently improve its organization in all field of work. The EU is an economic organization in the beginning. They extend their concern to other aspect of life include human rights. As stated in the previous chapter, by integrating human rights in their organization, the EU gets a lot of benefit especially in economic sector. It affirms that human rights not only enhance peoples' rights but also promote organization's aim and objective to be a

world economic actor. The EU's experience shows that human rights have its function to solve social problems among all societies. It reduces the conflict and brings harmony in the community.

Conflict and poverty among ASEAN member states still continue to exist. Myanmar case has the long history of human rights violations and no regional mechanism could settle that issue. Poverty which is massive in some part of ASEAN countries also raises the problem of immigration. And nowadays, the conflict of 'culture and heritage' adds the long way to go for having ASEAN Community.

To have similar benefit as the EU has, ASEAN should accept human rights as its common values by having a legal binding mechanism. For ASEAN, it will be better than the EU if ASEAN have specific human rights institution and court. The establishment of the ASEAN Intergovernmental Commission on Human Rights which were endorsed by the HLP will not adequate to protect the human rights of ASEAN peoples. The function of the Commission will only limited to the promotion of the rights. It needs more than intergovernmental of human rights to protect the peoples. The Court is one of the options.

It is still far to go for ASEAN to have the Court, but I would argue that it is also now needed to have such mechanisms as ASEAN visions to be an ASEAN Community in 2020. Without having those mechanisms, ASEAN Community is far to be reached.

Thirdly, integrating human rights promotes democracy and self-governance in regional organizations. Democratic deficit is a current issue in the EU. Parliamentary rule making, Council decision making as well as Court decision have been a problem democracy and self-governance in the EU. As it stated before, in the beginning the EU's main concern was merely economic. Later the EU has found itself less democratic with less legitimacy and self-governance. Then finally, human rights which were introduced by the Court through case-law some cases as mention in the previous chapter filled the gap of lacking democratic legitimacy and self-governance in the EU. Presently, human rights have a prominent place in the part of the law and policy of the EU. Human rights empower the citizens to participate and defend their rights economically, politically and culturally.

Based on the EU's experience, ASEAN should start to integrate human rights from beginning before ASEAN community is established in

near future. The ASEAN leaders and member states should have common understanding about the importance of human rights in order to unite unified ASEAN Community.

Presently, there is a big movement from NGOs and experts in ASEAN supporting the establishment of an ASEAN human rights court and mechanism. In the other side, at the present, ASEAN is in the process of building the human rights mechanism, but of having Court and legal binding one is still in the negotiation. If ASEAN only has a soft mechanism for now, then by the time ASEAN will finally decide to have the hard one. And at the end, as in Europe, there will be two separate systems: the human rights court under ASEAN and under the ASEAN Community. I am sure there will be a lot of problem between those systems. To avoid that, the ASEAN should consider having 'hard' mechanism from now, before the other similar mechanism is also established.

In the EU, the Court plays an important role to raise human rights issues. That is, the ECJ 'constituted' human rights through case law. In the process, human rights in the EU faced many obstacles such as the question of constitutionality and justification. It as not that easy to make human rights an integral part of the EU. I would argue that presently the EU already takes the benefit of integrating human rights to reach the EU's aim and objective as I already mentioned in the previous session.

The ASEAN Charter alone does not provide a sufficient framework for human rights body and mechanism. The ASEAN Charter indeed a good first step towards establishing human rights body and mechanism but without sufficient framework of it, those body and mechanism will just an issue (W. Sim, 2008).

Human rights should be protected and fulfilled in every level: State, Regional and International organizations through democratic legislation and effective implementation. Yet, the rule-making in ASEAN is only based on consensus, and often done behind closed doors without public participation. Not like in the EU, ASEAN does not have parliamentary control, and therefore human rights in ASEAN walks very slow. It is really hard to have democratic rule-making which is a requirement for the protection of human rights.

European integration confirms that without having human rights constitutionally, both economy activities and human rights protection cannot

become effective in achieving the EU's aim and objectives. They are interrelated and intertwined with each other and therefore they must be part of the EU law and policy. As ASEAN moves to be ASEAN Community in 2015, human rights is a condition of the lawfulness of the Community action. Market freedom which also established freedom of good, person, capital throughout ASEAN, need Community comprehensive action and therefore human rights will take place its function to settle of existing problem caused by market freedom. Simultaneously, market freedom will enhance the people economy ability and indirectly will enhance the fulfillment of people rights.

The fact shows that ASEAN presently concern of human rights integration into their organization, but the effort to make it into reality is still far to go. I would emphasized that ASEAN needs to go faster in building the legal binding human rights mechanism through law, policy and enforcement body like court to accelerate their movement in order to reach their vision becoming ASEAN Community in 2015.

Free movement of goods, people and services across EU members has successfully been implemented because the role of the Court to constitutionalise human rights in their law. For ASEAN, to get maximum protection of freedom of movement that will be established in 2015 through ASEAN Community, there is a need to constitute the protection of human rights especially economic rights such as rights of property.

ASEAN should have a new approach with regard to its human rights. A rule based approach to economic development based on human rights and people centered which are used by the EU is a good lesson for ASEAN as ASEAN moving toward single market and Community. AICHR supposed to be an initiator in this regard. AICHR should create a lot of activities and program to enact this approach. They should prepare rules, procedures, and institution to promote and protect human rights. In the EU, based on functional theories, human rights has its function of EU economy policy objectives, but at the end, human rights has its function as to protect and fulfill citizen rights to be more prosperity and has peace life. Human rights have reinforced and enlarged the individual rights of EU citizens.

The idea to have a legally binding mechanism on human rights in ASEAN is also influenced by the understanding of few ASEAN people on the international human rights regime under the UN. They mostly come

from NGOs and Academics. They emphasized that human rights empower individual and institution as well (El-Agraa, 2008).

V. Obstacles for Integrating Human Rights into the Law and Policy in ASEAN

There are indeed many obstacles of integrating human rights in the ASEAN law and policy. From the explanation above, I would conclude that there are at least five obstacles to integrate human rights into ASEAN's law and policy. First is cultural differences; second is the envy and antagonism that has existed between some of member states; third is the different legal system of member states; fourth is the reluctance of member states to give their sovereignty over regional arrangement; and the last is the lack of mutual benefit and interest among ASEAN member states. To bring the idea of ASEAN Community and legally human rights mechanism, these problems should be resolved. The searching of common values among ASEAN countries will eliminate those difficulties mention above.

The ASEAN leaders and member states should have a common understanding about the importance of human rights in order to unite the ASEAN Community. Common perception and recognition of universal human rights in ASEAN region is important to build a stable rule based regional organization. To that end, a new human rights culture and citizen oriented policies are needed to build human rights mechanism in ASEAN in order to achieve the ASEAN Community. A legally binding mechanism will be more appropriate at this moment to accelerate the integration. The EU experience confirms that without such an organ in regional level, the respect for human rights both in member states and regional level will only rhetoric. Simultaneously, the integration of human rights into the EU law and policy are the most effective tools to control the power of the organization and foster democratic legitimacy.

ASEAN member states also have to strengthen their relations, to narrow their culture gap, to avoid conflict and to give up part of their sovereignty for the organization. They have to create as much as common interests for more mutual benefit among them which will pursue their integration include human rights.

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