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Human Rights, Democracy and Good Governance: The Essential elements of EU Development Assistance?

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Summary:
Since the end of the Cold War, the importance of the so-called New Policy Agenda arises. Nowadays it belongs amongst the most pressing foreign policy issues of most European states, and of the European Union as well. However, despite its rapid development, it is still rather controversial. The aim of this paper is to explore the problems connected with incorporating the NPA into the framework of ACP-EU relations and to examine the opportunities for using the negative and positive conditioning of observance NPA principles through development aid.

Keywords: EU, ACP countries, Lomé Conventions, Cotonou Agreement, human rights, democracy and democratization, rule of law, good governance

Lidská práva, demokracie a dobrá správa veřejných věcí: základní součásti rozvojové pomoci, kterou poskytuje EU?

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Abstrakt:
Od konce studené války roste význam tzv. nové politické agendy. V současnosti tato agenda patří ke klíčovým součástem zahraniční politiky ve většině evropských zemí i v Evropské Unii jako celku. Přes rychlý rozmach je však stále zatížena některými nedostatky.Předložený text zkoumá problémy spojené se začleňováním nové politické agendy do rámce vztahů zemí AKP a EU a hodnotí možnosti využití negativního a pozitivního podmiňování respektu k principům nové politické agendy prostřednictvím rozvojové pomoci.

Klíčová slova: vnější vztahy EU, země AKP, kondicionalita rozvojové pomoci, Dohody z Lomé, Dohoda z Cotonou, lidská práva, demokracie a demokratizace, vláda zákona, dobra správa veřejných věcí

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Content:

Introduction

Since the end of the Cold War, agendas that retro ceded the strategic and security priorities given rise to by rivalry among mutually antagonistic political blocs are coming to the fore in the international community. For instance, the attention paid to intensifying and deepening economic relations among countries, to the development support for less advanced countries, or, to environmental protection has been increasing over the long term. As a result, a close linkage emerges between financial aid provided to developing countries and efforts to promote the reforms and transition processes aimed at installing democracy, rule of law, respect for human rights, transparent and accountable government, as well as the development of the market economy.

However, in the very beginning in the post-cold-war era no consensus; as to whether it should be realized through development aid, or more specifically, through its negative and positive political conditionality[1]; has emerged. There were many advocates of such an approach: - Western states, the World Bank, the Organisation for Economic Co-operation and Development, the Organization of American States; etc. However, several subjects, including the United Nations Development Programme, as well as some third world countries, have expressed their reservations (Crawford 2001: 4-7). As a result, the issue was discussed repeatedly, both in different international fora[2], at domestic level in the particular states and within the various relevant intergovernmental organizations. Subjects that supported establishing the connection between development aid and the so-called New Policy Agenda (NPA), covering the above mentioned issues, with the exception of the market economy component, have perceived the political reforms as aiming towards incorporating and strengthening democratic principles, the rule of law, respect for human rights, as well as good governance; as prerequisites for economic prosperity and development. On the other hand, they stressed that donors should be allowed to exercise some control over the way the financial means they provide are used. Opponents argue that granting financial (development) aid subject to: the implementation of democratic principles, or improvements in the way legislative, executive and judicial powers are utilised; to be an unacceptable interference in the domestic affairs of the recipient states.

Within the two following decades; the 1990s and the current, first decade of the 21st century; the linkage between development aid and the NPA became a widely accepted reality, as it played an important role in supporting successful transformation in some regions; especially in Central and Eastern Europe, and

1 There are two types of conditions attached – a negative one with substance especially in cutting of development aid wholly or at least partially and a positive form based on incentives in form of benefits the recipient country gains after meeting certain conditions (Uvin 2004: 56-82).

2 The Commonwelth summit in October 1991 belonged to initial ones.

in Latin America. However, several problems concerning the character and extent of this conditionality, as well as its legitimacy, or the appropriateness of legal bases, are constantly arising. The following paper does not attempt to discuss whether development co-operation should really be combined with certain NPA goals, as it is a normative question to be answered by politicians. It aims to analyse the controversial aspects of attaching conditions to the aid provided to the: African, Caribbean and Pacific (ACP) countries within the former Lomé Conventions, and the contemporary Cotonou Agreement framework with special emphasis on constraints given by the insufficiencies of legal adjustment. To fulfil this aim the paper will proceed in 4 steps. First of all, initial conditions for NPA pursuing, and for its incorporation into, development policy as (not) created in the establishing treaties of the Community are explored. After that, attention is paid to the legal and practical meanings of the emergence of human rights provisions in the Lomé III Convention, and of the incorporation of the NPA principles into the preamble of the Single European Act. The third part of the text focuses on improvements made possible by the end of the Cold War. Finally, the latest developments connected with the new face of ACP-EU relations based on the Cotonou agreement are examined.

Methodologically, the paper is based primarily on documentary analyses beginning with the treaties establishing the European Communities and the European Union; as well as their later amendments; and continuing with several instruments of Community secondary legislation dealing with arrangements incorporated in conventions concluded with non-member (ACP) countries. As an additional methodological tool, the analysis of the conditions under which the particular documents were adopted is applied.

1. Development aid without NPA elements – the states prior to incorporation

1.1 Towards common principles and identity - bridging over the lack of human rights provisions in the founding treaties

Despite the fact that rapid progress of the NPA was, as already stated above, closely connected with the end of the Cold War, some of its elements developed much earlier. It did not belong amongst the objectives of European integration included in the Treaty of Rome of March 1957; either in its internal or external form, as it omitted political questions and was basically of an economic nature.[3] Yet, in an implicit way, it was embodied in the crucial aim of European integration: to achieve liberty and prosperity for all European peoples (Williams

[3] On the other hand, there was probably no need to include human rights in the Treaties, as each of the six founder members were signatories of the Convention for the Protection of Human Rights and Fundamental Freedoms; a document signed in the Council of Europe in November 1950 (despite not all having ratified the Convention by that time).

2005: 17-18). In accordance with the Vienna Convention on the Law of the Treaties, it could be derived from the circumstances of establishing the Community, hat common principles like democracy or human rights are a part of the important philosophical, political and cultural elements on which the founding Treaties are based.

From the practical point of view, human rights represent the first part of the NPA which was incorporated into Community activities. The need to consider human rights at the European Economic Community (EEC) level was given primarily with the interconnection of human rights and economic issues directed by European bodies, which became apparent already at the initial stages of the integration process.

On the EEC's internal agenda, human rights started to be taken into account thanks to the decisions of the European Court of Justice (ECJ), at the end of 1960s. Since then they have been treated as an integral part of the general principles of Community law, reflecting member states traditions and guidelines incorporated in human rights conventions, and establishing a sort of European legal order (Neuwahl; Rosas, eds. 1995: 302, 303; Rosas 2001: 53, 56).

In contrast, the connection of these principles with the external agenda of Community remained untouched. The international system, which was paralyzed by the Cold War, did not allow for pursuing an external human rights policy, or any other parts of the NPA agenda, systematically, either separately or as a part of development co-operation. The scope of the activities which could be undertaken had to stay limited and rather weak as far as its legal background was concerned, but still emerged during the 1970's.

1.2 Embodying human rights agenda into the external relations of the European Economic Community – the case association instruments

From the very beginning of the integration process it was clear that the Community must develop its own external relations, too, and co-operate extensively with some non-member countries, just as France insisted on maintaining traditional ties to former parts of its disintegrating colonial empire. Therefore, the Treaty of Rome provided a basis for the association of overseas dependencies and territories with EC member states, with the aim of promoting the economic and social development of the particular countries, and to further the interests and prosperity of their inhabitants (article 3(k) together with article 131). However, neither the text of the Treaty of Rome, nor of the annexed "*Implementing Convention relating to the association of Francophone African states and territories"* for the period of the first five integration years exceeded the framework of the "trade and aid" contribution to economic, social and cultural progress. The same held true regarding the Yaoundé Convention which replaced

the initial amendment in 1963[4], and the Lomé I Convention of 1975, extending the association practice to numerous Commonwealth countries in accordance with the requirements of the United Kingdom, which had entered the Community in 1973.

Trying to overcome former colonial patterns, the documents of association emphasized the principle of non-interference in domestic affairs. The principle did not permit the incorporation of particular elements of the NPA; like human rights; as they usually mean a certain kind of intervention. The only reference establishing at least an indirect linkage between association (or development aid) and human rights principles was the reference to the Charter of the United Nations,[5] embodied, e.g. in the Preamble of the Treaty of Rome (Charter of the United Nations: chapter IX, article 55(3); Treaty of Rome: Preambule; Williams 2005: 19-25).

The establishment of relations with the group of, originally eighteen, Francophone countries, and later forty former French and British colonies; termed the African, Caribbean and Pacific (ACP) states;[6] appeared to be sufficient until the establishment of the internal link between the Community and human rights within the ECJ's jurisdiction. The switch to human rights, democracy and the rule of law proceeding at internal level, as well as some external incentives from the Carter administration emphasising human rights in US foreign policy, made it unsustainable in the late 1970s, and forced the revision of the initial approach. Moreover, there was strong pressure for implementing steps in that direction, particularly from some member states which had started to incorporate elements of the NPA into their foreign activities at the end of 1970s,[7] and in a much broader way, from the general public.

In the second half of the 1970s, on the basis of the Lomé I Convention, the EEC guaranteed trade preferences and provided technical and financial aid to several authoritative and repressive regimes. In some of these states, such as, Uganda, Liberia, and the Central African Republic of Equatorial Guinea; atrocious violations of human rights occurred. With regard to the principle of non-interference, the Convention did not provide the Community with any tools to deal with those atrocities with the exception of criticism; both generally and on a specific level; of the Lomé I institutional structure. Therefore, there was the risk that EEC funds could be misused in such a way that, in fact, human

4 Renewed in 1969 with little amendment.

5 The Charter refers to "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" in its article 55. (Charter of the United Nations: chapter IX, article 55(3)).

6 Thanks to further territorial extension the group of the so-called ACP countries comprises 77 states today.

7 Especially the Netherlands.

rights were violated with a Community contribution (Neuwahl; Rosas 1995: 299, 300; Bulterman 2005: 253).

To meet the public demand it was necessary to ensure that Community external action corresponded with the general principles of Community law which became the main tasks of conditionality, also, in Community external policy, in the near future. However, it was rather complicated because, as a consequence of weaknesses in the legal basis, doubts have emerged as to the means, and/or extent to which this should be done without an explicit mandate from the primary or secondary Community legislation. In response to human rights violations, aid to Uganda was suspended partially. The EEC condemned the excesses publicly, and threatened to take further steps within the framework of its treaty relations, too. Yet, it did not reject its treaty obligations, as such, as it was not ready to abandon the principle *pacta sund servanda*. The approach articulated in the so-called Uganda Guidelines from June 1977[8] has been applied generally since that moment. Theoretically, it can be considered a first step towards integrating the NPA, and human rights in particular, into development co-operation. Yet it was done in a reactive way, with no attempts made to add some components which could be labelled as active (Fierro 2003: 42-44).

1.3 Towards a certain kind of aid conditionality? – Failure of the first "Lomé" debate

At the end of 1970s, when negotiations on the Lomé II Convention were opened, the Netherlands and the United Kingdom requested the incorporation of human rights references into the text of the treaty, which would have provided the basis for certain improvements in the field of human rights protection, albeit limited to particular cases. Interest was especially strong from the of the Netherlands' side; itself one of the pioneer countries, which had been pursuing human rights in its foreign policy since the end of that decade, and had already formulated the linkage of human rights foreign policy in 1979.

In contrast, other EC member countries such as Germany, Belgium or France did not show much enthusiasm regarding human rights provisions in the convention. One possible explanation of their attitude is that they feared that the ACP countries would criticize human rights violations inside the EC countries themselves, which had already been the case with African workers in France, or immigrants in the UK. On the other hand, the criticism of human rights violations in the post-colonial world has always been a sensitive political issue. The lowest common nominator seemed to be the reference to the most fundamental human rights in the preamble of the treaty accompanied by an EEC unilateral declaration permitting the EEC's condemnation of atrocities, if

[8] For Uganda Guidelines, see the Statement of the Council, Bull. EC of 21.06.1977.

there any take place after the document came into force (Fierro 2003: 48-49; Arts 2000: 171).

However, as has been shown already in the first debate on the inclusion of the human rights clause in the agreement, which was held at the ACP-EEC Council of Ministers meeting in June 1977; the ACP countries were reluctant to agree to any human rights references in the new instrument, as they perceived them as incompatible with the spirit of Lomé trade and economic co-operation relations, and as a way for Europe to interfere in their internal affairs. They preferred human rights to be left in the domain of the United Nations and stressed, that despite the existence of a common human rights standard in the form of the Universal Declaration on Human rights from 1948, it would be difficult to reach common definitions. As Karin Arts puts it, they "*although divided on many other negotiation points…showed great unity and strength in their efforts to keep human rights references out of Lomé II.*" (Arts 2000: 171).

As a result, despite numerous discussions on the matter, the reluctance of the ACP countries, and the disunity within the EEC, meant that any references to human rights, either in the preamble of the Lomé II Convention, or in its body, were omitted. Yet, at the signing ceremony, the European Commissioner for Development, Cheyson, pointed out that the EEC would apply human rights in relations with third countries without exception. In Internal Regulations on EEC aid to the ACP from November 1979, the Council of Ministers confirmed that human rights protection belonged amongst the basic aims of the Convention and, in cases of severe violations, the EEC might consider appropriate measures without specifying what action could be taken in particular cases. It was a slight rhetoric shift towards more activity but it was, in practice, a reactive approach based on applying the principles expressed in the Uganda guidelines. This became especially apparent during the dramatic events in Surinam in 1982 (Bartels 2003: 10-11).

2. The real emergence of the NPA within the Lomé framework

2.1 The second "Lomé" debate

In the first half of the 1980s, the debate about human rights in the context of the EEC-ACP relations got under way. It reflected that human rights still attracted, very much, the interest of the European public and, therefore, the issue of including human rights provisions into the treaty rose again when negotiating the Lomé III Convention.

Similarly to the former case, the debate took place almost on the platform of the ACP-EEC Council of Ministers, and the ACP-EEC Consultative Assemblies. However, despite the fact that the attitude of ACP countries to human rights

changed after adopting the "*Banjul Charter on Human and Peoples' rights*" in 1981, and they were more ready to discuss human rights and search for common ground with the EEC, the EEC did not succeed in including effective human rights provisions which would enable the more extensive use of conditionality again. It was weakened in its policy towards the racist regime in South Africa, which it had condemned formally, without curtailing mutual trade (Bartels 2005: 13-14).

The only progress achieved was the inclusion of several references to human rights such as the faith in fundamental human rights and the dignity and the worth of the human being in the first paragraph of the preamble, or the well-being of ACP countries population, recognition of the role of the women, the enhancement of peoples, the respect for human dignity, as objectives of cooperation with ACP countries in article 4[9]. Yet, the Lomé Convention established a precedent, and human rights clauses began to be included into the preambles of agreements with third countries, such as with the Cartagena ones in 1986, which was an important step for the future[10] (Lomé III Convention: preamble, article 4, Annex I, Annex IX).

In 1986 there was a breakthrough in the internal sphere of the EEC, as human rights were mentioned in the primary legislation for the first time, thanks to the preamble of the Single European Act (SEA). Next to a reference on human rights in the internal policy, the Preamble included also a reference to the external dimension.. Thanks to this reference, human rights were not a single part of the emerging NPA any more. As is obvious from the wording, democracy and compliance with the law were added, although only in a general form (Single European Act: preamble, recital 5).

According to the European Parliament (EP), the EEC now had some of the political responsibility for the situation in the world, although, without any direct legal consequences. Yet, the opinion of the European Commission differed substantially. Shortly after the SEA was signed, the EP asked the Commission to prepare a proposal for a Community act which would make much clearer the legal basis for the external human rights policy as a more important NPA element by then. The Commission refused to do so, as it found the act not to correspond with the Community's treaties. It was convinced that the EEC might take human rights into account while exercising its external powers in accordance with the aims of Community, and the competences it was given by the Treaty of Rome and the Single European Act. But it did not feel

9 Further elaborated in Annex I to the Convention.

10 Since that time a new instrument labeled: references to human rights; in contractual relations with third countries has been a part of European human rights foreign policy, next to financial assistance, diplomatic bargaining and sanctions and relations with the United Nations, the Organization for Security and Cooperation in Europe and the Council of Europe.

itself allowed to pursue independent activities within the field of the New Policy Agenda as such, because it still exceeded the Community's framework (Fierro 2003: 66; Rack; Lausegger 1999: 820).

2.2 The end of the Cold War and Lomé IV negotiations

In a changing international climate influenced by the end of the Cold War, certain restrictive measures were accepted after the coup in Panama and the massacre on Tiananmen square in China in 1989. The position of the NPA in foreign policy and in international relations, as such, was greatly strengthened with the decline of bipolarity, as there was more room for NPA issues in the agenda of the UN, and other international organizations and groupings, including the European Communities.

In accordance with this trend, and on the basis of the changing attitude of ACP countries, after the above mentioned UN "*Declaration on the Right to Development*" and the "*Banjul Charter on Human and Peoples' Rights*" had been adopted, a human rights clause was incorporated into the body of the Lomé IV Convention (article 5). Next to international trends, such steps towards stronger human rights protection in the external relations of the EEC highlighted the weakened bargaining position of the ACP states, which were much more dependent on European aid while facing increased economic problems than they were during the previous rounds of Lomé negotiations, too[11] (Bartels 2005: 15).

In fact, there were two additional paragraphs concerning human rights in the preamble of Lomé IV (one mentioning international covenants on human rights and the other referring to regional European and African instruments), and an article in the body of the treaty called "*Objectives and Principles of Co-operation*" stipulating, *inter-alia*, that "*cooperation shall be directed towards development centered on the man, the main protagonist and the beneficiary of development, which, thus, entails respect for, and promotion of, all human rights*" (article 5(1)). Unlike previous versions of the Treaty, it envisaged positive conditionality in the form binding ongoing development aid with certain progress regarding human rights, and of support or help to achieve more acceptance for human rights. Nevertheless, despite its extent (substantially influenced by the demands of the ACP countries which EEC was trying to meet in order to achieve the incorporation of a human rights clause into the body of the treaty); the meaning of the clause was rather rhetorical again. Similarly to the Lomé III Convention, it did not enable suspension of the treaty if serious human rights breaches occurred (negative conditionality) (Fierro 2003: 69).

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11 Already in 1987 the EEC and the ACP states were able to adopt a joint ministerial declaration called the Kingston Declaration which referred to the principles of equality and human dignity and included an action programme against apartheid.

The limits of the human rights clause in the application of Lomé IV showed themselves already in 1991, after a coup had taken place in Haiti, when the Community decided to interrupt financial aid and technical co-operation. Due to the lack of a legal basis the measures could not be extended imposing a trade embargo (although the Committee of Ambassadors of ACP States called for such a step) until it was authorized by a UN Security Council resolution, which meant in practice more than a year's delay (Bartels 2005: 19).

3. NPA as an issue of international concern - consolidating the new policy agenda within the Cotonou Agreement framework

3.1 From reluctance to a human rights clause

With the end of the Cold war, internal violations of human rights in particular states stopped being understood primarily as their domestic matter and became an international affair which was reflected also in some subsidiary sources of international law (but not in its basic, legally binding, principles). Corresponding to this trend, the EEC revised its approach, too. Its previous belief that actions against human rights violations constitute a non-acceptable interference in internal affairs was refused. Soon after that, several steps towards developing a real external NPA, and establishing even closer linkage with development aid followed. In 1991, the Commission of the EEC produced a communication "*on human rights, democracy and development co-operation policy*" affirming the need to assist democracy, democratization and respect for human rights all over the world, and to consider these goals in development cooperation. Priority was given to political and civil rights, but, social, economic and cultural rights were mentioned as an important matter as well.

The communication continued the shift from the reactive policy of merely responding to atrocities, to an initiative approach, with elements of positive support. As a result, financial assistance and political dialogue had to be used primarily, but the former measures of criticism and sanctions in case of violations, were incorporated, too.

According to the communication human rights clauses (including references to democracy) had to be embodied in all agreements which the Communities conclude with third countries, which was confirmed in a *'Council and its Member states'* resolution "*on human rights, democracy and development*" several months later (articles 4, 6-10).

At the European Council meeting in Luxembourg, human rights elements of the NPA practice were further elaborated in a far reaching "*Joint declaration concerning human rights*", with the main message that human rights are considered to be one of the cornerstones of EEC relations with third countries. The declaration

reflected, inter alia, the trend of introducing human rights conditionality in the foreign policies of member states such as Germany or France. Moreover, it involved general guidelines and priorities in the field of human rights and, despite not being intended as the introduction of conditionality, it foresaw also the possibility of appropriate responses to human rights violations, and to serious interruptions of democratic processes (Bartels 2005: 17-22; Napoli 1995: 306).

At the request of the EP, the Commission created several budget lines devoted to NPA implementation at the beginning of the 1990s. The amount of money spent on this issue increased regularly. In 1992 it started to publish annual reports "*on the application of the Council resolution on human rights, democracy and development of November 1991*" resuming activities and projects realized on behalf of human rights and democratization. In response to the EP's request financial instruments used for the promotion of democratic principles, and civil and political rights, into a single chapter: "*European Initiatives in support of Democracy and the protection of Human Rights*" (EIDHR) – chapter B7-70; whereas, economic and social rights remained under different budget headings (Rack; Lausegger 1999: 809).

The incorporation of the NPA (including democracy, human rights and the rule of law with democracy on the first place as an umbrella principle) into external relations, was confirmed by the Treaty of Maastricht, namely by its preamble, provisions concerning the objectives of the newly established EU, provisions concerning the development policy and the settlement of the Second Pillar – the Common Foreign and Security Policy (CFSP). Within this field, the European Union was allowed to pass additional legislation – common strategies and common positions, legally binding for particular member states, which define the approach of the EU to various matters of a thematic or geographic nature[12].

For the Union member countries, new opportunities appeared, to draw attention to several problems outside Union's frontiers, especially as they were allowed to propose decisions within the CFSP pillar, which, in the field of common activities is the sole domain of the European Commission. Yet, to formulate a common position, a unanimous vote was required by the provisions of the Treaty (until the Treaty of Amsterdam enabled the abstention of less than one third of member states), which meant that taking a particular decision became difficult if there was a marked difference in attitude among Union members. Otherwise, once a strategy was already formulated, a majority vote

[12] Simultaneously, as was confirmed later by the ECJ, article 130(u) of the Treaty on the European Union provided the legal basis for human rights clauses in external agreements, when it stated that the Community in its development co-operation shall "*contribute to the general* objectives *of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.*"

sufficed to enforce a common action, and therefore opened more room for bargaining and for coalition building (articles J. 2.-J.3 TEU).

3.2 Democratization as a foreign policy goal – connection with human rights policy

It is obvious that from the legal point of view the Treaty of Maastricht extended the scope of the NPA, constituted particularly by human rights protection before, to the more general foreign policy goals of democratization and the rule of law. This is so, thanks to their evident content relation, and also, to the similar range of tools that can be used to achieve them.

However, unlike human rights, which are defined clearly in several international legal instruments, the content of the term: democratization; seems to be, from the theoretical point of view, rather problematic. A disunited definition of the concept of democracy that is to be achieved by means of democratization is one of its pitfalls (Crawford 2001: 16-20).

While exploring the ways to promote the democratization tendencies in different parts of the world, the EU has searched for a definition, both in the international instruments and in its internal rulings. At international level, the *"Charter of Paris for a New Europe"* was especially emphasized. Yet, as a document belonging to the framework of the OSCE, it could be applied vis-à-vis the OSCE-member states, but hardly transferred to others. Concerning the ACP countries, in 1998 the Commission expressed its views in a communication entitled "*Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenges for Partnership between the European Union and the ACP states*".

The communication focused on the dynamics of the democratization processes and, therefore did not provide a definition of democracy as such; rather, a comprehensive definition of democratic principles, based especially on three fundamental characteristics: legitimacy, legality and effective application (p. 5). Furthermore, there was a definition of the basic elements of the rule of law, and the concept of good governance. According to its wording, the rule of law includes (but is not limited to) a legislature respecting human rights and fundamental freedoms, an independent judiciary, an effective and accessible means of legal recourse, a legal system guaranteeing equality before the law, a police force at the service of the law and an effective executive enforcing the law (p. 4). Good governance highlights the inter-linkage of human rights, democratic principles and the rule of law having four related aspects: equity and primacy of the rule of law in the management of resources, institutional capacity, transparency and public involvement in the decision making process (p. 7).

Nevertheless, the communication was not of the legally binding character, and must therefore be treated as a kind of programme, or principles, guiding the EU's foreign policy activities, which may be abandoned, if necessary. Transforming the principles into legal obligations with consequences for their breach, required either, a legislative act of the Council of Ministers (binding only on the EU and its member states, but not on non-member countries), a provision in the primary legislation (which is probably not an appropriate instrument for this type of situation) or, provisions in an international treaty (with legal consequences both for the EU and the non-member state signatories). Each of these possibilities has certain difficulties attached.

3.3 New provisions of the Mid-Term Lomé IV review and the Cotonou Agreement

At the end of the second millennium there were several reforms concerning NPA promotion initiated by particular European institutions, and an important shift in the primary legislation of the EU. The Treaty of Amsterdam strengthened the position of the NPA in EU internal affairsan made the observance of its elements binding for the Community institutions in all their activities. The same principle was embedded in article 51 of the "*EU charter of fundamental rights*" adopted together with the Treaty of Nice at the end of 2000. Nevertheless, despite the great patience shown to the NPA within the EU, critical reports identified several shortcomings – e.g. a low degree of: coherence and consistency, transparency and prioritization.

Regarding ACP-EU relations after the Treaty of Maastricht entered into force, a Mid-Term review allowing revision of certain provisions of the Lomé IV Agreement, concluded for a period of ten years, started. In the new world order established after the end of the Cold War, it was no surprise that the EU used the opportunity to table human rights provisions for reconsideration. As in accordance with the new settlement of CFSP, the NPA should not have been limited to human rights any more than it insisted on adding the principles of democracy and the rule of law, as the basis of co-operation.

Meanwhile the positions of the ACP countries changed substantially, too. Human rights, democracy and the rule of law were no longer perceived as controversial subject in the conceptual sense, but as a means of improving the way of life for the people concerned (Arts 2000: 216). They could be agreed as the essential principles of the Lomé IV Convention which allowed the EU to take appropriate measures in the case of breaches; including full and partial suspension of treaty obligations for violations.

The Cotonou Agreement, signed in Benin in June 2000 to substitute the Lomé IV Convention, confirmed the importance of the NPA in the ACP-EU relations

again, and made the observance of democratic principles, human rights and the rule of law a basis for ACP-EU relations, too. The possibility to incorporate the definition of democratic principles was not used, but it was an agreement about a legally binding definition of the rule of law. It was based on the one included in the above mentioned Commission Communication of 1998,[13] while containing a new definition of good governance (Cotonou Agreement: Article 9(3)).

From the political point of view, the components of the NPA have been further clarified and elaborated within a policy dialogue established on the basis of the Cotonou agreement after its entry into force. There was a five year revision of the agreement envisaged in its text, and this was first carried out in 2005; its purpose is almost exclusively to allow for technical changes in the dialogue mechanisms, but not for incorporating additional elements of the NPA, or further elaborating its content. On the one hand, it shows that the current arrangement seems to be sufficient, or at least appropriate, according to the circumstances, for, conditionally, achieving an ACP-EU consensus on particular issues. On the other hand, it results from the fact that the Cotonou arrangement went beyond internal Community settlement in primary legislation and in two (secondary legislation) Council regulations – the regulation No. 975/1999 "*laying down the requirements for the implementation of development co-operation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms*"[14] and the Regulation no. 2240/2004 amending the previous one.[15] Unlike the Cotonou agreement, for instance, the principle of good governance was not mentioned in the regulations, although it is believed to serve as an umbrella principle, covering democracy, human rights and the rule of law, and helps with their integration. However, in a certain sense, the lack of provisions concerning good governance in European law represents a shortfall, because from the internal (European) point of view it gives rise to questions as to whether the EU can be a party to such obligations.

Conclusion

Regarding conditionality in ACP-EU relations, or more to the point, in EU development aid provided to the large group of ACP countries; it must first of all be said that an important shift was achieved within the two post-Cold-War decades. In the initial phases of the ACP-EU (previously EEC) relations there was no linkage between any parts of the NPA and development aid, or, more precisely, trade with ACP counties; which did not allow the EEC to respond to

13 See chapter 3.2.

14 OJ L 120/1 of 8.5.1999.

15 The regulations could be adopted in accordance with the new wording of the TEU as amended in the Treaty of Amsterdam, namely, in articles 308 and 179.

breaches of NPA principles actively, although they were quite frequent. First, attempts to stop supporting repressive regimes had to be based on a certain kind of the interpretation of the Lomé I Convention (despite being in accordance with the Vienna Convention on the Law of Treaties) and not on clear provisions in the document body.

The above described situation changed slowly during the 1980s. Although, more than an agreement on certain principles common both to ACP and the EEC countries, it reflected the worsened bargaining position of the first group. Also, the EEC took the issue instrumentally and pursued it only because of public demand, and under condition that it did not clash with other policy goals. The crucial turn came only in the first half of 1990s, with the new climate in international politics. During that time it was possible to agree upon a so-called human rights clause (in fact, extending the field of human rights, and referring to other NPA elements as well) allowing whole, or partial, suspension of treaty obligations if its principles are seriously infringed. It meant a legitimacy of negative measures not envisaged in further versions of co-operation agreements; nor was it elaborated upon in founding treaties, or in the Treaty on European Union. The measures were used in practice repeatedly, although not too intensively.

Unlike primary and secondary European legislation (with the exception of some 'soft-law' instruments), the current document guiding ACP-EU relations, the Cotonou Agreement; not only incorporates the NPA issues as essential principles of cooperation, but also (up to the democracy section) introduces their definition in a form which is legally binding on all contracting parties. Therefore, the problem of the lack of provisions concerning conditionality turned into the question of appropriateness and legitimacy in some cases of its application.

Today the absence of the definition of democracy, or democratization and the incorporation of good governance, with a hard core represented by preventing and fighting corruption, seem to be the cause of most controversies. In the case of democracy, the essence of the dispute is of a more general nature, as neither theory not practice has found a universal, or common, denominator of the term yet. Neither have the way *functional* democracy looks, been defined, because it differs from country to country. Concerning good governance, the character of the debate is legal. The EU has referred to good governance several times in different documents, but it did not incorporate it into its basic treaties and into legally binding acts within its secondary legislation. The matter could be considered when new treaties will be presented for signing in the future – especially the European Reform Treaty and the ACP-EU Economic Partnership Agreement.

References

ACP-EEC Convention signed at Lomé on 28 December 1975.
http://www.acpsec.org/en/conventions/lome2_f.htm.

ALSTON, P. (ed.) (1999): *The EU and Human Rights*. Oxford: Oxford University Press.

ARTS, K. (2000): *Integrating Human Rights into Development Cooperation*: The Case of Lomé Convention. The Hague: Kluwer Law International.

BARTELS, L. (2005): *Human Rights Conditionality in the EU´s International Agreement.,* Oxford: Oxford University Press.

BULTERMAN, M. (2005): The contribution of the Agency to the External Policies of the European Union. In: ALSTON, P.; de SCHUTTER O. (eds.) (2005): *Monitoring Fundamental Rights in the EU. The Contributing of the Fundamental Rights Agency*. Oxford: Hart Publishing, pp. 273-276.

Communication from the Commission to the Council and the European Parliament – Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States. COM 98/0146 final.

Commission Communication to the Council and Parliament: Human Rights, Democracy and Development Cooperation Policy. SEC (91) 61 final.
http://aei.pitt.edu/2937/01/031.pdf.

Communication on The European Union's Role in Promoting Human Rights and Democratization in Third Countries. COM (2001) 252.
http://ec.europa.eu/external_relations/human_rights/doc/com01_252_en.pdf.

FIERRO, E. (2003*): The EU's Approach to Human Rights. Conditionality in Practice*. Hague: Martinus Nijhoff Publishers.

Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, OJ L 229 17/08/1991, http://eur-lex.europa.eu/
LexUriServ/LexUriServ.do?uri=CELEX:21991A0817(01):EN:HTML.

Joint declaration concerning human rights. Bull EC 6-1991.

NEUWAHL, N.; ROSAS, A. (eds.) (1995): *The European Union and Human Rights*. Hague: Martinus Nijhoff Publishers.

Partnership agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part (Cotonou Agreement).
http://ec.europa.eu/development/ICenter/Pdf/agr01_en.pdf.

RACK, R.; LAUSEGER, S. (1999): *The Role of the European,Parliament: Past and Future*. In: Alston, P. (ed.) (1999): *The EU and Human Rights*, Oxford: Oxford University Press, pp. 801-838.

Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide. OJ L 386, 29.12.2006.

Resolution of the council and of the member states meeting in the council on human rights, democracy and development. Bull EC 5-91.

ROSAS, A. (2001): The European Union and International Human Rights Instruments. In: Kronenberger, V. (2001): *The European Union and the International Legal Order: Discord or Harmony?* Hague: T. M. C. Asser Press, pp. 53-68.

Single European Act. OJ L 169 of 29.6.1987.

Third ACP-EEC Convention signed at Lomé on 8 December 1984.
http://www.acpsec.org/en/conventions/lome3e.htm.

Treaty of Amsterdam amending the treaty on European Union, the Treaties establishing European Communities and related acts. OJ C 340 of 10.11.1997.

Treaty establishing a Constitution for Europe. OJ C 310 of 16.12.2004.

Treaty establishing the European Economic Community.
http://eur-lex.europa.eu/EUDOROrder.do?year_no_oj=1957/CEE&oj_vol=1&lang=EN&series=TRAITES&page_first=NA&page_last=NA.

Treaty on European Union. OJ C 191 of 29.7.1992.

Treaty of Nice amending the treaty on European Union, the Treaties establishing European Communities and certain related acts. OJ C 80 10.3.2001.

WILLIAMS, A. (2005): *EU Human Rights Policies. A Study In Irony*. Oxford: Oxford University Press.

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