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DIRECTORATE B
- POLICY DEPARTMENT -

Human Rights and Democracy Clauses in the EU's International Agreements

Abstract:

This study examines the evolution and current status of the EU's policy of including human rights and democracy clauses in its international agreements. Based on a close reading of their texts, this study describes the range of ways in which the implementation of these clauses might be improved. In this regard, the emphasis is on the potential use of these clauses within the institutional framework established by the international agreements in which they are contained.

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EXECUTIVE SUMMARY

INTRODUCTION

This study examines the evolution and current status of the EU's policy of including human rights and democracy clauses in its international agreements. Based on a close reading of their texts, this study describes the range of ways in which the implementation of these clauses might be improved. In this regard, the emphasis is on the potential use of these clauses within the institutional framework established by the international agreements in which they are contained.

The study proposes that human rights and democracy clauses are useful in the following ways:

- as a basis for political dialogue between the parties concerning compliance with human rights and democratic principles
- as the basis for establishing working groups, possibly including non-executive actors such as representatives of parliaments, regional organizations and civil society, to establish benchmarks and monitor compliance with these norms
- as the basis for a consultation procedure in the event of non-compliance with these norms
- to enable a party to take unilateral measures in the event that the other party fails to comply with these norms
- to enable a party to suspend any cooperation which violates that same party's own obligations with respect to human rights and democratic principles
- to preclude a party to an agreement from objecting to the involvement of the other party in activities for the promotion and protection of human rights in its territory

This study also makes a number of specific criticisms concerning the wording of human rights and democracy clauses, and of the possibility and desirability of using human rights and democracy clauses as the basis for funding initiatives to promote and protect human rights and democracy in third countries when more appropriate instruments exist for this purpose.

SUMMARY OF THE STUDY

The study is in five parts. Part 1 describes the evolution and current status of the EU's policy on human right and democracy clauses. Part 2 analyses the operation of the existing clauses, with particular reference to the institutional powers of the bodies established under the EU's trade and cooperation agreements. Part 3 compares the EU's policy on human rights and democracy clauses to its other policies for the promotion of human rights and democracy in third countries. Part 4 discusses the role of the European Parliament. Part 5 (replicated in this summary) sets out proposals for reform. It consists of 15 recommendations for reform of the EU's policy on human rights clauses and a model draft for a new human rights and democracy clause.

PART 1 – Description of human rights and democracy clauses

This part describes the evolution and current status of the EU's policy of including human rights and democracy clauses in its international agreements, the network of agreements containing human rights and democracy clauses, and structural and textual variations in existing clauses.

Section 1 describes the **key dates** in the evolution of the policy:

- 1977** The EEC first applies a **conditionality policy** when it *de facto* suspends aid allocated under the Lomé I Convention to Uganda following a massacre.
- 1989** The Lomé IV Convention contains a clause providing that **financial resources** could be allocated to the promotion of human rights in the ACP States with their agreement.
- 1990** At its request, a cooperation agreement with Argentina contains a **basis clause** stating that the agreement was based on respect for human rights and democratic principles.
- 1992** Agreements with the three Baltic countries and Albania contain an **essential elements clause** stating that respect for human rights and democratic principles is an essential element of the agreement and a **suspension clause** giving the parties the right to suspend the agreement without notice if there is a violation of its essential elements.
- 1993** Agreements with Romania and Bulgaria replace the suspension clause with a **non execution clause** (which dates from 1978 in the context of trade remedies) that provides that the parties may take appropriate measures in the event that the other party fails to comply with an obligation. In the selection of measures, priority must be given to those which least disturb the functioning of the agreement. Except in cases of special urgency, the joint council under the agreement must first examine the matter.
- 1993** Agreements with the Czech and Slovak Republics include a Joint Declaration providing that **cases of special urgency** 'means a case of the material breach of the Agreement' including violation of the essential elements clause
- 1994** An agreement with Russia provides that 'appropriate measures' are measures taken **in accordance with international law** and that the other party may resort to dispute settlement (non-binding in this case).
- 1995** The **EU Council approves a 'suspension mechanism'** in Community agreements with third countries to enable the Community to react immediately in the event of violation of essential aspects of those agreements, particularly human rights.
- 1995** The Lomé IVbis Convention refines the non-execution procedure including a **detailed consultation procedure** prior to the taking of 'appropriate measures'
- 1999** The EU Member States reach an **Internal Agreement** on the implementation of the non-execution procedure in the Lomé IVbis Convention. This leads to an increase in the use of this procedure.

2003 Permanent subcommittees are established under six agreements with a mandate to discuss human rights and democratic principles.

2005 Revision to 2000 Cotonou Agreement provides that **intensified political dialogue** on human rights and democratic principles must precede and continue during the consultation procedure and the taking of any appropriate measures.

Section 2 outlines **the coverage of human rights and democracy clauses** and the **major gaps** in the EU's policy. Either directly, or via agreements with regional organisations, it has concluded or is negotiating agreements containing human rights and democracy clauses with around 150 countries in virtually all parts of the world. There are however variations.

Agreements with basis or essential elements clauses but no non-execution clauses

The cooperation agreements with Argentina (signed 1990), Uruguay (1991), Macao (1992), and Paraguay (1992) contain 'basis' clauses, and the cooperation agreements with Brazil (1992), Mongolia (1992), India (1993), Sri Lanka (1994) and Vietnam (1995) contain only 'essential elements' clauses. These agreements do not contain non-execution clauses.

Agreements with both essential elements clauses and non-execution clauses

There are non-execution clauses in all other agreements containing essential elements clause: the two remaining Europe association agreements with Romania and Bulgaria (both signed 1993), the ten Euro-Mediterranean association agreements (1995-2004), the two stabilization and association agreements with Croatia and Fyrom (both 2001), the agreement with Mexico (1997), the association agreements with South Africa (1999) and Chile (2005), the twelve partnership and cooperation agreements with the countries of the former Soviet Union (1994-2004), the cooperation agreements with the Mercosur countries (1995), the Central American (1993; 2003) and Andean Pact countries (1993; 2003), and the Cotonou Agreement (2000). These are all 'mixed agreements' concluded by the Community and its Member States together. In addition, there are non-execution clauses in the 'pure' cooperation agreements with Albania ('Baltic' clause, 1992), Korea (1996), Cambodia (1997), Laos (1997), Yemen (1997), Nepal (1995), Bangladesh (2000) and Pakistan (2001).

Interpretative declarations

Of agreements containing non-execution clauses, there are Czech/Slovak Declarations, defining cases of 'special urgency', in all agreements except those with Romania and Bulgaria (both signed 1993), and Israel and Tunisia (both signed 1995). There are also Russian Declarations, stating that measures will be taken 'in accordance with international law' and referring to 'dispute settlement', in all agreements except these four and the agreements with Moldova and Ukraine (both signed 1994) and Kazakhstan and Kyrgyzstan (both signed 1995). In some cases, these declarations have found their way into the treaty text, but even where these are not formally part of the treaty text, these declarations have significant legal weight.

Application of dispute settlement to human rights and democracy clauses

The Europe and Euro-Mediterranean association agreements (except for Syria), the agreement with South Africa and the Cotonou Agreement all provide for binding dispute resolution of 'any dispute relating to the application or interpretation' of the agreement, which includes all matters concerning the implementation and interpretation of human rights and democracy clauses. The procedure is first to seek resolution within the joint council (eg Association Council) administering the agreement, but if that fails, to resort to binding arbitration. However, no other agreements, including the recent association agreements with Syria, Croatia, Fyrom, and Chile

(and the agreement with Mexico), include such binding dispute resolution applicable to human rights and democracy clauses.

Gaps

There are no human rights and democracy clauses in any general cooperation agreements with any developed countries. Sometimes this is because these agreements predate the Community's policy concerning human rights and democracy clauses. But in some cases (the EEA Agreement, the San Marino customs union and the proposed Andorra cooperation agreement) the absence of a human rights and democracy clause is more blatant. The absence of contractual relations may also be the result of developed country reluctance to sign up to human rights and democracy clauses. Most notably, during 1996-97 Australia and New Zealand refused to agree to EU cooperation agreements specifically because of the EU's insistence that these agreements had to contain human rights and democracy clauses.

The 1964 association agreement with Turkey, and even the 1995 Association Council decision establishing a customs union with Turkey also failed to contain a human rights and democracy clause, though the question was hotly debated, and compliance with human rights norms has since become central to Turkey's application for EU membership. Further afield, the EU's relations with countries in South-Eastern Asia are only intermittently subject to human rights and democracy clauses. Bilateral trade with China (outside of the WTO) is regulated under a 1985 cooperation agreement with no human rights and democracy clause, and trade relations with six of the ten Association of South East Asian Nations (ASEAN) countries take place under a 1980 cooperation agreement which well predates the EU's policy. Cambodia, Laos and Vietnam have concluded bilateral agreements containing human rights and democracy clauses; in stark contrast, Myanmar is excluded from contractual relations because of its very poor human rights record. For the same reason, Cuba has been refused permission to join the Cotonou Agreement.

Sectoral agreements

Finally, the EU does not include human rights and democracy clauses in any sectoral trade agreements with third countries. This does not just apply to developed countries,¹ but also to sectoral agreements with all countries, including those that have a demonstrated difficulty in complying with human rights and democratic principles. For example, on 23 October 2003 the European Parliament passed a resolution on Turkmenistan which contained a litany of human rights abuses in that country (as well as others):² indeed, it is for this reason that a signed partnership and cooperation agreement with this country has not yet been ratified. And yet, two months later, on 24 December 2003, the EU Council decided on the provisional application of a textiles agreement with no human rights and democracy clause with Turkmenistan from 1 January 2004.³ Similar comments could be made about the numerous fisheries agreements concluded with ACP countries that at the very least present a risk of continuing violations of human rights and democratic principles.⁴

Section 3 discusses the EU's implementation of human rights and democracy clauses. This has so far taken two practical forms:

Establishment of subcommittees with a mandate to discuss the promotion of human rights and democracy

¹ Eg, with Australia, the EC has agreements on mutual recognition [1998] OJ L229/3; scientific and technical cooperation [1994] OJ L188/18 and trade in wine [1994] OJ L86/1.

² European Parliament resolution on Turkmenistan, including Central Asia [2004] OJ C82E/639.

³ Council Decision of 17 December 2003 on the signing and provisional application of bilateral agreements between the European Community and certain third countries (Azerbaijan, Kazakhstan, Tajikistan and Turkmenistan) on trade in textile products [2003] OJ L340/54.

⁴ Eg Guinea-Bissau fishing agreement [2004] OJ L127/27; Guinea fishing agreement [2004] OJ L99/11.

Subcommittees have been established under the association agreements with Morocco, Jordan and Tunisia, and **Subgroups** on human rights have also been established under the cooperation agreements with Bangladesh (Subgroup on Governance and Human Rights), Vietnam (Subgroup on Cooperation in Institution Building, Administrative Reform, Governance and Human Rights). More are foreseen, including with Laos and Pakistan.

Consultations and adoption of appropriate measures following failure to respect human rights and democratic principles

Consultations have been undertaken on 14 occasions for non-execution of an essential elements clause. Negative reactions under human rights and democracy clauses have been limited to the Cotonou Agreement and its predecessor, the Lomé IV Convention. Specifically, consultations under the non-execution clauses in these agreements have been held with Togo (flawed electoral process: 1998 and democracy, respect for human rights and fundamental freedoms: 2004), Niger (coup d'état: 1999), Guinea-Bissau (coup d'état: 1999 and 2004), Comoros (coup d'état: 1999), Cote d'Ivoire (coup d'état: 2000 and democratic failures: 2001), Haiti (flawed electoral process: 2000), Fiji (coup d'état: 2000), Liberia (violations of human rights, democratic principles, rule of law and serious corruption: 2001), Zimbabwe (violations of human rights, democratic principles, rule of law: 2002), Central African Republic (coup d'état: 2003), and Guinea (deterioration of democracy and the rule of law, failure to respect human rights and fundamental freedoms and the lack of good economic governance: 2004). Appropriate measures have been adopted with respect to Togo (sanctions since 1993), Haiti (since 2001), Liberia (since 2001), Zimbabwe (since 2002), and Guinea (since 2005).

In addition to these 14 instances of consultations, from 1989-98 the EU suspended development aid without reference to a human rights and democracy clause in these cases: Burundi (1993 and 1997), Central African Republic (1991), Congo (1997), Djibouti (1991), Equatorial Guinea (1992 and 1994), Gambia (1994), Guinea-Bissau (1998), Haiti (1991), Kenya (1991), Liberia (1990), Niger (1996), Rwanda (1994), Sudan (1990), and Togo (1992). The reason for the increased use of the non-execution clauses after 1999 is likely to be that it was only in that year that the Community managed to adopt a decision setting out the procedure for deciding on the implementation of Article 366a of the Lomé Convention.

PART 2 – Analysis of existing human rights and democracy clauses

This part provides a detailed legal analysis of the interpretation and application of existing human rights and democracy clauses.

Section 4 discusses the **interpretation** of existing clauses with particular reference to mischaracterisations of the clauses in the past. Its central points are:

Drafting deficiencies

Human rights and democracy clauses poorly drafted. A large number of the agreements containing human rights and democracy clauses do not have the objective of promoting or protecting human rights and democratic principles, with effects for the powers of the joint councils established under the agreements (see next section). It is also questionable whether they impose any obligation to comply with human rights and democratic principles or whether they merely establish the conditions on which the agreement is based. This affects the legal avenues available in the event of non-compliance.

International human rights standards

To the extent that they incorporate non-binding norms (such as the entire Universal Declaration on Human Rights), existing human rights and democracy clauses impose higher standards and more effective enforcement of the protection of human rights and democratic principles than under customary international law.

Extraterritorial obligations

The parties to a human rights and democracy clause are under an obligation not to contribute to violations in third countries, including the territory of the other party. The EU is under an additional obligation under EU law not to contribute to such violations. In the event of a complaint against the institutions on this basis, a human rights and democracy clause operates as an instrument at an international level to enable the EU to comply with its domestic obligations.

Section 5 discusses the actual and potential **application** of the existing clauses:

Joint Council decisions

The joint councils established under agreements usually have the following powers to adopt decisions or non-binding recommendations:

- a general power to achieve the objectives of the agreement (which only rarely include express mention of human rights and democratic principles),
- specific powers to **establish subgroups** to assist in the implementation of the agreement, and (in some cases) to resolve disputes concerning the interpretation and application of the agreement

These subgroups could be established to draw up benchmarks for the implementation of and to monitor compliance with these norms. They could include non-executive actors, including representatives of parliaments, regional organizations and civil society.

Political dialogue

Essential elements clauses may be used to establish normative standards for political dialogue. They may also have the effect of *deeming* human rights and democratic principles to be a topic of common interest. Finally, they may be useful to the extent that political dialogue is conducted via subgroups established by decision of the joint council (see previous point).

Funded initiatives

Human rights and democracy clauses (essential elements and non-execution clauses) are of limited relevance as a basis for funded initiatives to promote and protect human rights and democratisation in third countries.

- Appropriate measures are an inappropriate basis for funding activities, as these depend on a determination that the other party has failed to fulfil an obligation. This is diplomatically undesirable and raises legal difficulties concerning the ‘appropriateness’ of the measure to the ‘failure to fulfil obligations’.
- But **essential elements clauses will preclude a party from objecting to funded activities** taking place on its territory.

Negative measures

Negative measures take the form of suspending any benefits under an agreement in response to non-compliance with the norms in an essential elements clause. Where there is no non-execution clause, the justification is an implied repudiation under Article 60(3)(a) of the Vienna Convention on the Law of Treaties (not Article 60(3)(b)). Where there is a non-execution clause, negative measures takes the form of **appropriate measures** under that clause. Appropriate measures must be proportional to the violation and must not themselves violate human rights. They may also be subject to binding or non-binding **dispute settlement**.

PART 3 – Human rights and democracy clauses and EU human rights policies

Section 6 compares human rights and democracy clauses with other EU instruments that are available for the promotion and protection of human rights and democratic principles. The key points are:

- **Political dialogue** on human rights and democratic principles does not depend on the clauses but these may be a useful way of institutionalising the dialogue
- **Monitoring of compliance** can take place by way of a subgroup established under an agreement or (in most cases) by reference to the proposed Fundamental Rights Agency.
- **Funding of initiatives** does not depend on human rights and democracy clauses and these clauses add little to the EU's policy in this regard. There is one exception: essential elements clauses operate to **preclude the other party from objecting to these initiatives**.
- **Other EU conditionality clauses.** There is an urgent need for coordination between human rights and democracy clauses and the standards and suspension mechanisms in the EU's other conditionality clauses (eg in its enlargement policies, and the autonomous instruments providing for financial and technical aid and for trade preferences).
- **CFSP.** There is a need for coordination between economic measures taken in the context of the CFSP and under human rights and democracy clauses.

Section 7 sets out the views of NGOS, which are generally positive of the EU's stated policy but critical of its implementation.

PART 4 – Role of the European Parliament

Part 4 discusses the role of the European Parliament in the implementation of human rights and democracy clauses, in particular concerning its powers under Article 300 of the EC Treaty and suggests reforms to this process.

Section 8 discusses the powers of the European Parliament with respect to human rights and democracy clauses. Article 300(3) subparagraph 2 of the EC Treaty provides that the Parliament must give its assent to association agreements, as well as other significant agreements. In addition, the Parliament has the right to be consulted on all other agreements, except for trade agreements concluded on the basis of Article 133(3). Any extension of these rights to other agreements would increase the Parliament's influence over this aspect of the agreements.

Articles 300(2) subparagraphs 2 and 3 of the EC Treaty expressly restrict the Parliament's role in two cases of relevance to human rights and democracy clauses. These provisions state as follows:

By way of derogation from the rules laid down in paragraph 3, the same procedures shall apply for *a decision to suspend the application of an agreement*, and for the purpose of *establishing the positions to be adopted on behalf of the Community in a body set up by an agreement, when that body is called upon to adopt decisions having legal effects*, with the exception of decisions supplementing or amending the institutional framework of the agreement (emphasis added).

The European Parliament shall be immediately and fully informed of any decision under this paragraph concerning the provisional application or the suspension of agreements, or the establishment of the Community position in a body set up by an agreement.

Both of the decisions mentioned in subparagraph 2 above are of direct relevance to human rights and democracy clauses. A decision to suspend an agreement includes all cases of suspending an agreement on the basis of an essential elements clause (via Article 60 VCLT) or on the basis of an applicable and operative non-execution clause. The establishment of a position concerning decisions of a body established under an agreement necessarily includes all cases concerning the range of measures discussed in this study, in particular:

- Joint Council decisions to establish subgroups for the purpose of conducting political dialogue and monitoring compliance with human rights and democratic principles;

- Joint Council decisions following the invocation of the consultation procedure foreseen in the non-execution clauses; and
- Joint Council decisions resolving a dispute under relevant dispute settlement procedures.

In summary, Article 300(2) subparagraphs 2 and 3 concern the very essence of the practical implementation of human rights and democracy clauses. It is therefore recommended that the European Parliament make it a priority to revoke the carve-out of its ordinary powers established in these subparagraphs.

Informal EU policies

Even in the absence of reform to Article 300(2) EC, the European Parliament should be able to press for informal involvement in the EU's decisionmaking process on matters concerning human rights and democracy clauses. First, the Parliament can press for involvement in the formation of any positions to be taken in the joint councils that relate to human rights and democratic principles. Second the Parliament can press for formal involvement in the meetings of these councils. Third, the Parliament can press for the establishment of subcommittees under these agreements with a human rights and democracy mandate and for a formal role in these subcommittees. The Parliament can also work towards having human rights and democratic principles as a standing agenda item on the meetings of the joint council.

PART 5 and Annex (model human rights and democracy clause)

Part 5 sets out **15 concrete recommendations**, targeted at the European Parliament, to strengthen the EU's policy on human rights and democracy clause.

Recommendations

1. New agreements

A striking anomaly in the EU's policy concerning human rights and democracy clauses is the fact that they are not included in sectoral agreements (eg fisheries, steel, and textiles) often concluded with third countries with less than perfect records in the area of human rights and democratic principles. This should be remedied. In the longer term, it would also be desirable to ensure a uniform application of human rights and democracy clauses in all agreements with all third countries, especially developed countries. However, this depends on the consent of those countries, which, as history has demonstrated, cannot be guaranteed.

Recommendation 1: The European Parliament should call for all new agreements to contain human rights and democracy clauses, in particular sectoral agreements.

2. Implementation of existing clauses

Without a doubt, the single most important failure of the EU's policy on human rights and democracy clauses is the failure to invoke them in cases in which they are obviously relevant. The European Parliament also has a tendency to criticise violations while not calling for any measures,¹ or to fail to cite applicable human rights and democracy clauses when calling for measures.² This practice undermines the coherence and credibility of a uniform EU external human rights policy.

¹ See, eg, European Parliament resolution on the human rights situation in Ethiopia, P6_TA-PROV(2005)0305, 7 July 2005, which failed to recommend any measures.

² See, eg, European Parliament resolution on Zimbabwe, P6_TA-PROV(2005)0303, para 11, 7 July 2005, which failed to mention an applicable human rights clause.

Recommendation 2: The European Parliament should systematically refer to applicable human rights and democracy clauses when referring to violations of relevant norms in third countries and should recommend appropriate measures to be taken.

3. Normative standards

There is no escaping the impression that human rights and democracy clauses are very poorly drafted. There is a fundamental lack of clarity on the normative value of the essential elements clause, and consequently on the applicability (if any) of the non-execution clause. This has not been helped by various statements by the European Commission on the legal effect of these clauses. The following delineates the most important areas in which greater clarity would be desirable.

a. Clarity on applicable standards

The norms and principles in existing essential elements clauses are sufficiently general to cover all civil and political, as well as economic, social and cultural rights, and in addition democratic principles, sometimes even beyond the standard applicable under customary international law. They also cover women's rights and workers' rights. It is not necessary to add to the palette of individual rights, which is better achieved in the day-to-day work of political dialogue and, where necessary, consultations under a non-execution clause.

The standards in human rights and democracy clauses should also be coordinated with other standards applicable between the parties under international law. The current practice of incorporating by reference norms in instruments that are either wholly or partly non-binding under customary international law (eg the OSCE instruments or the Universal Declaration on Human Rights) should be continued only on the basis of a proper understanding of its true legal effects. An effort should be made to ensure that the standards set out in essential elements clauses do not unknowingly rise above the standards applicable under customary international law.

Recommendation 3: The European Parliament should work for the inclusion of the model Article B in new agreements. It should also refrain from calling for additional clauses, such as on women's rights and labour standards.

b. Benchmarking of applicable standards

Further clarity can be brought to the manner in which these standards can be implemented in the context of any given country. In this respect, the new reference in the Cotonou Agreement to benchmarking is to be welcomed. However, benchmarking should not be limited to the context of political dialogue (as it is in that Agreement), but should also apply to consultation procedures in the event of non-compliance.

See Recommendations 7 and 10.

c. Normative status of the essential elements clause

It cannot be assumed that existing essential elements clauses contain an obligation to comply with the norms made an 'essential element' of the agreement. This should be clarified.

Recommendation 4: The European Parliament should work for the inclusion of model Article B in new agreements. In the case of existing agreements, the Parliament should work towards a statement affirming that the parties are under an obligation to comply with the norms in the

essential elements clause. This statement could take the form of a decision of the relevant joint council or, if necessary, a joint declaration by the parties.

However, it is necessary to ensure that the EU does not exceed its competence under the EC Treaty to enter into obligations in the field of human rights. In the case of mixed agreements, a clause defining the ‘parties’ in terms of their respective powers almost certainly removes this danger. In pure agreements it must be ensured that the EU does not exceed its competence.¹

Recommendation 5: The European Parliament should work for the inclusion of model clause E in new pure Community agreements.

d. Coherence in standards applicable to third countries

The standards applicable in essential elements clauses should be coordinated with the standards applicable under other EU instruments. At present, some countries are subject to host of different standards including Article 6(1) EU; the Copenhagen criteria; special conditions applicable to the Western Balkan countries; essential elements clauses; and conditionality provisions in autonomous EU regulations on financing and trade preferences. As in the case of Slovakia in 1997, this can lead to the standard in the essential elements clause being ignored, in favour of a different (though equally applicable standard) in another instrument. This is unsatisfactory from an administrative perspective; it also weakens the claims of the EU to the coherence of its external human rights and democratisation policy.

Recommendation 6: The European Parliament should ensure consistency among the normative standards applicable in conditionality clauses in autonomous EU instruments providing or financial and technical assistance and trade preferences (including in the EU’s enlargement policies), ensure consistency between these standards and those in the clauses and ensure consistency in the implementation of measures based on these standards.

4. Improved procedures for implementing human rights and democracy clauses

a. Political dialogue

Both the 2005 revision of the Cotonou Agreement, with its greater emphasis on political dialogue and the establishment of permanent subcommittees to discuss these matters in a variety of third country agreements have pointed the way to a greater institutionalisation of these issues in the ordinary conduct of the relationship between the EU and its partners. This is to be welcomed. Consideration should also be given to the involvement of representatives of the parliaments, regional organisations and civil society.

Recommendation 7: The European Parliament should work for the inclusion of model Article C in new agreements and in agreements without any provision for political dialogue. In the case of existing agreements, the Parliament should work towards procedural rules to the same effect, by way of a decision of the relevant joint council.

b. Monitoring of compliance

An important innovation waiting to be implemented is the establishment of formal arrangements to monitor compliance with the standards established in the essential elements clauses. There are two main options for such monitoring: the establishment of a working group under the agreement with competence to monitor compliance, and a reference to the proposed Fundamental Rights Agency. The advantage of the former option is that it is more truly

¹ The EU and its Member States are jointly responsible under the Cotonou Agreement. It is beyond the scope of this study to discuss the implications of this responsibility with respect to human rights and democratic principles.

bilateral, and may therefore more diplomatically acceptable, than the latter. There is also greater scope for the involvement in such a working group of non-executive actors. In both cases, a system of annual reports, along the lines of the US State Department Country Reports on Human Rights Practices, may be desirable.¹

Recommendation 8: The European Parliament should call for the establishment of permanent subgroups or subcommittees under third country agreements with a mandate to review compliance with human rights and democratic principles. These groups should include, where appropriate, representatives of parliaments, relevant regional organizations, and civil society. The subgroup should prepare an annual report on compliance by the parties to the agreement.

Recommendation 9: The European Parliament should also give consideration to calling for a decision of the respective joint council to establish ongoing cooperation with the proposed Fundamental Rights Agency. The FRA should prepare an annual report on compliance by the parties to the agreement.

c. Consultations under non-execution clauses

With the exception of the Cotonou Agreement, the procedures for consulting the other party prior to the taking of ‘appropriate measures’ are very thinly described in the agreements. Nothing more is required than a notification to the joint council of the ‘matter’ and there is little requirement for a serious discussion of the matter before unilateral measures are taken. The Cotonou Agreement is much more detailed on this point, especially in linking intensive political dialogue with the invocation of consultations under the non-execution procedure. This model, or at least a simplified form, should be adopted in other agreements as well.

In addition, consideration should be given to broadening the range of actors involved in these consultations. At present, consultations take place in the context of the joint council established under the agreement. It may be appropriate to involve non-executive actors.

Recommendation 10: The European Parliament should work for the inclusion of model Article D(1)-(5) in new agreements and in agreements without any provision for consultations. In the case of existing agreements, the Parliament should work towards procedural rules to the same effect, by way of a decision of the relevant joint council.

d. Scope of appropriate measures

There is a lack of clarity on whether appropriate measures are limited to the suspension of benefits under an agreement. It has been suggested in this study that there is little need or value added in the use of ‘appropriate measures’ to fund human rights and democratisation initiatives, given that a range of perfectly serviceable instruments already exist for this purpose, and given that it would be necessary to tie any such measures to a ‘failure to fulfil an obligation’.

Recommendation 11: The European Parliament should refrain from implying that funding of human rights and democratization initiatives should take the form of ‘appropriate measures’ under a non-execution clause.

e. Review of appropriate measures

All non-execution clauses (except in the Cotonou Agreement) lack a mechanism for reviewing the continuing relevance of appropriate measures. There should be a built-in ‘sunset clause’ on all appropriate measures, which should in addition be reviewed in the same forum in which they

¹ Riedel and Will (1999) 749-51; cf also Clapham, 669-671.

were first discussed; usually in the joint council. This is all the more important for measures taken in a case of ‘special urgency’, as these can be taken without prior consultations.

Recommendation 12: The European Parliament should work for the inclusion of model Article D(6) in new agreements and in agreements without any provision for political dialogue. In the case of existing agreements, the Parliament should work towards a decision of the relevant joint council to the same effect.

f. Clarity on cases of ‘special urgency’

In most agreements, the definition of the cases of special urgency in which unilateral ‘appropriate measures’ may be taken without consultations is misconceived. Rather than being limited to cases of temporal urgency, the applicable definition speaks of ‘material breach’. This is problematic because (a) it implies that a serious breach renders consultations useless, and (b) it has the effect of rendering every violation of the norms in an essential elements clause a case of ‘special urgency’. The Cotonou Agreement, and Egypt and South Africa agreements provide for a more sensible definition of cases of ‘special urgency’ in terms of temporal urgency.

Recommendation 13: The European Parliament should work for the inclusion of model Article D(7) in new agreements. In the case of existing agreements, the Parliament should work towards a statement specifying that cases of ‘special urgency’ are those in which there is a temporal urgency necessitating a quick response. This statement could take the form of a decision of the relevant joint council or, if necessary, a joint declaration by the parties.

g. Binding third party dispute settlement

A commitment to the rule of law would support the notion of recourse to binding third party dispute settlement procedures in all cases involving appropriate measures under a non-execution clause. At present, such recourse is available under the Cotonou Agreement, the agreement with South Africa and the Europe and Euro-Mediterranean association agreements (except with Syria), and non-binding conciliation is available under the partnership and cooperation agreements. However, there is no possibility for any form of third party dispute resolution on these matters under the more recent Stabilization and Association Agreements, nor under the agreement with Mexico, nor the association agreement with Chile, nor any of the EU’s ‘pure’ cooperation agreements with third countries.

Recommendation 14: The European Parliament should give consideration to the desirability to subjecting any appropriate measures to dispute settlement under an agreement.

5. Role of the European Parliament

At present, the role of the European Parliament in the drafting and implementation of human rights and democracy clauses is limited. This could be enhanced by involvement in political dialogue and consultations, as well as by involvement in any decisions to suspend agreements and the establishment of positions to be adopted by joint councils in international agreements. The former role has been addressed in Recommendations 6-9. In addition:

Recommendation 15: The European Parliament should call for the revision of Article 300(2) to provide for its involvement in any decisions to suspend agreements and the establishment of positions to be adopted by joint councils in international agreements, and, prior to this, call for informal involvement in these procedures.

ANNEX Model human rights and democracy clause

An Annex sets out a model human rights and democracy clause for inclusion in new agreements.

[Article A] Objectives

The aims of this [agreement/association] are: [...] the promotion and protection of respect for human rights and democratic principles.

Comment

This redrafted subclause makes it clear that the agreement has the twin objectives of promoting and protecting human rights and democratic principles. This is necessary to trigger the powers of the Joint Council to adopt decisions or non-binding recommendations to achieve these two aims of the agreement. The first objective (promotion) provides a basis for proactive decisions to encourage reform, while the second (protection) provides a basis for decisions to prevent regression; specifically, negative measures.

[Article B] Human rights and democratic principles

The parties shall respect legally binding democratic principles and human rights [as set out in [legal instrument]] in their internal and external policies.

Comment

This redrafted clause establishes a clear obligation on the parties to comply with the stated norms, which is necessary for the proper application of the non-compliance clause. If the bracketed phrase is excluded, the principles and human rights that give content to the obligation will be those already binding on the parties under customary and conventional international law. If the bracketed phrase is included, the parties have the option of raising the applicable standard of human rights according to the nominated instrument. Article [E] below ensures that this obligation does not exceed the EU's competence under the EC Treaty.

[Article C] Political dialogue

1. Political dialogue shall cover all issues of common interest to the Parties, in particular [...] and the obligations of the parties set out in Article B. [The parties may develop and agree specific benchmarks or targets with regard to these obligations, taking into account the special circumstances of the party concerned. Benchmarks are mechanisms for reaching targets through the setting of intermediate objectives and timeframes for compliance.]

2. *Comment*

The first sentence of this clause is a slight modification to existing clauses on political dialogue to ensure that the parties routinely discuss their obligations to respect human rights and democratic principles in their political dialogue. The bracketed phrase is based on Article 2(2) of Annex VII of the Cotonou Agreement, where it also applies to political dialogue. It refers to the obligations of the parties in Article B rather than to 'internationally agreed standards and norms'. However, this sentence may not always be appropriate, as it implies that the parties may have difficulties in implementing these obligations. This may be diplomatically insensitive.

3. The European Parliament, the [national] parliament, and representatives from regional and sub-regional organizations and representatives of civil society shall be associated with this dialogue.

Comment

This clause is based on Article 8(7) of the Cotonou Agreement. In addition, it specifies that the European Parliament and the national parliament are to be associated with the political dialogue.

[Article D] Non-compliance with Article B

Comment

This redrafted clause applies solely to violations of Article B. It is retitled ‘non-compliance’ to emphasise that Article B establishes an obligation with which the parties must comply.

1. If either party considers that the other party has failed to comply with Article B, it shall, except in a case of special urgency, supply the [Joint Council] with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the parties. To this end, it shall invite the other party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation.

Comment

This clause is based on Article 96(2)(a)(1) of the Cotonou Agreement, except that, for the sake of brevity and to avoid the risk of setting a new standard, it uses the term ‘comply with Article B’ rather than the term used in that provision (‘failure to fulfil and obligation stemming from respect for human rights, democratic principles and rule of law referred to in paragraph 2 of Article 9’).

2. The European Parliament, the [national] parliament, and representatives from regional and sub-regional organizations and representatives of civil society shall be associated with these consultations.

Comment

This clause is based on Article 8(7) of the Cotonou Agreement, where it applies to political dialogue. In addition, it specifies that the European Parliament and the national parliament are to be involved in consultations.

3. The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution.

The consultations shall begin no later than [X] days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In any case, the consultations shall last no longer than [Y] days.

Comment

This clause reproduces Article 96(2)(a)(2) and (3) of the Cotonou Agreement except for optional variations in the time periods involved.

4. During consultations, the parties shall develop and agree specific benchmarks or targets with regard to the obligations of the parties in Article B, taking into account special circumstances of the party concerned. Benchmarks are mechanisms for reaching targets through the setting of intermediate objectives and timeframes for compliance.

Comment

This clause is based on Article 2(2) of Annex VII of the Cotonou Agreement, where it applies to political dialogue. It refers to the obligations of the parties in Article B rather than to ‘internationally agreed standards and norms’.

5. If the consultations do not lead to a solution acceptable to both parties, if consultation is refused or in cases of special urgency, appropriate measures may be taken. Appropriate measures must be proportional to the violation and comply with international law.

Comment

The first sentence of this clause reproduces the first sentence of Article 96(2)(a)(4) of the Cotonou Agreement. The second sentence is a simplified version of the first sentence of Article 96(2)(c)(1) of the Cotonou Agreement’. There is no reference to ‘measures least disturbing the functioning of the agreement’, a phrase which was developed in the context of trade remedies and which is inappropriate in this context. There is no reference to ‘suspension being a last resort’, as this is implied in the existing qualifications in the second sentence.

6. Appropriate measures must be reviewed in the [Joint Council] every [X] months. They shall be revoked as soon as the reasons for taking them no longer prevail.

7. Comment

The first sentence of this clause is new. It is a sunset clause mandating periodic review. It also ensures that the decision to revoke the measures set out in the second sentence is not taken unilaterally. The second sentence reproduces the second sentence of Article 96(2)(a)(4) of the Cotonou Agreement.

8. The term ‘cases of special urgency’ shall refer to exceptional cases of particularly serious and flagrant violation of Article B that require an immediate reaction. If measures are taken in cases of special urgency, they shall be immediately notified to the [Joint Council]. At the request of the party concerned, consultations may then be called in accordance with this Article.

Comment

The first sentence of this clause is adapted from Article 96(2)(b)(1) of the Cotonou Agreement, except that, for the sake of brevity and to avoid the risk of setting new standards, it substitutes a reference to ‘Article B’ for the phrase ‘one of the essential elements referred to in paragraph 2 of Article 9. The second sentence is taken from the first sentence of Article 96(2)(c)(2) of the Cotonou Agreement. The third sentence is a simplified form of the second and third sentences of the same provision. To avoid redundancy, there is no obligation to notify the Joint Council of the fact that a party is resorting to the special urgency procedure’ in the absence of taking a measure (as in Article 96(2)(b)(2) of the Cotonou Agreement).

In pure Community agreements

[Article E] Parties to the agreement

For the purposes of this Agreement, ‘parties’ shall mean, on the one hand, the Community, in accordance with its powers, and, on the other hand, [the other party].

Comment

This clause is adapted from the ‘parties’ clauses of mixed agreements. It has the advantage of minimising the danger that the Community will be responsible for the performance of any obligations under human rights and democracy clauses for which it lacks competence.