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POLITICAL PRINCIPLES IN ARTICLE 21 TEU AND CONSTITUTIONALISM*

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Introduction

Japan and the European Union announced a common press statement after the 20th regular summit between Japan and the EU on the 28th May 2011, in which both countries agreed to start a scoping process before the negotiations to conclude a free trade agreement (FTA) and a binding agreement that is related to the fundamental values and principles that they share. The latter agreement is a so-called political agreement. The EU requested to conclude such an agreement, although Japan wanted to conclude a FTA only. Negotiations between Japan and the EU took place from 9 October to 11 October 2013 for the third round of bilateral negotiations toward the political agreement, now a Strategic Partnership Agreement. Why did the EU want to conclude such an agreement?

The EU and Ukraine were going to conclude a partnership agreement including FTA, but the EU pulled out because a former prime minister, Y. Tymoshenko, who used to promote democracy in Ukraine, was found guilty of wrongdoing and imprisoned. On the other hand, the EU decided to suspend economic sanctions on Myanmar in recognition of the progress in democratisation.

The actions of the EU are related to the political principles of external action in Article 21 EU Treaty. In this paper, I would like to share my thoughts about those principles in the context of constitutionalism. In this paper, I will discuss the development of constitutionalism in the EU and that in the EU's external relations. The word "constitutionalism" in this paper means democracy, respect for human rights and the rule of law. First, I will describe the development of constitutionalism in the EU with treaty amendments. Secondly, I will explain how Article 21 of TEU is codified. Further, I will explain the meaning of the political principles in Article 21 of TEU in regard to the EU's external action.

I. Development of Constitutionalism and Political Principles

1. From the Beginning to the Maastricht Treaty

(1) Development of constitutionalism in the EU

The EU promotes democracy and respect for human rights, but at the beginning of the

* This paper is partly based on my paper written in Japanese, "The development of political principles in the EU's external policy", in Noriko Yasue (ed.), *EU and Global Governance* (Japanese), 2013, Horitsubunkasha, pp. 69-100.

ECSC or the EEC there was no catalogue of fundamental rights in the ECSC Treaty or the EEC Treaty because the Community was initially just aiming at economic integration. Although issues of fundamental rights were discussed in the Stork case in 1959¹ and the Geitling case in 1960², the European Court of Justice (ECJ) did not decide those cases in the light of the fundamental rights that are guaranteed in the national constitutions of the countries concerned, insisting that the Court would apply or interpret only EC treaties and its legal acts. However, for the first time in the Stauder case in 1969³ the ECJ decided that the guarantee of fundamental rights forms an integral part of general principles of law. This change derives from the decision of the primacy of EU law over national law in the Costa v. E.N.E.L case in 1964⁴. If EU law has primacy over national law that guarantees fundamental rights, EU law should also guarantee those fundamental rights. In the Nold case in 1974, the ECJ stated that it is bound to draw inspiration from constitutional traditions common to the Member States and international treaties for the protection of human rights⁵. In the Hauer case in 1979 the Court referred to the European Convention of Human Rights (ECHR) explicitly⁶. Subsequently, the Court has guaranteed fundamental rights referring to constitutional traditions and ECHR, although at that time the treaties did not include any catalogues of fundamental rights or similar articles.

The Treaty on the European Union (the Maastricht Treaty) of 1993⁷ has regulated the practices of ECJ since the 1970's and democracy and human rights explicitly for the first time. That amounts to a codification of the practices. In addition, the Maastricht Treaty creates the concept of EU citizenship and changes the name of the EEC Treaty to the EC Treaty. The Maastricht Treaty consolidated elements of constitutionalism and it was decisive for constitutionalism in the EU.

(2) Development of political principles in the EU's external relations

The Maastricht Treaty consolidated constitutionalism in the internal relations of the EU, but also reflected its development in its external relations. An important change is the introduction of Article 130u of the TEC for development cooperation. It ruled that community policy shall 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. This change led to the introduction of human rights clauses in international treaties that the EU concluded with third countries.

The main targets of the development policy are the African, Caribbean and Pacific countries (the ACP countries). The EC (at that time, currently the EU) concluded an association

¹ Case 1/58 Stork & Cie v. ECSC High Authority [1959] ECR 17.

² Joined cases 36, 37, 38 and 40/50 Prsident Ruhrkohlen-Verkaufsgesellschaft and others v. ECSC High Authority [1960] ECR 423.

³ Case 29/69 Stauder v. Stadt Ulm [1969] ECR 419.

⁴ Case 6/64 Costa v. E.N.E.L. [1964] ECR 585; In the case where the primacy of the EU law over national law is established; J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999) pp. 107-108; Allan Rosa, "The European Union and international human rights instruments", in Vincent Kronenberger (ed.), *The European Union and the International Legal Order* (T.M.C. Asser Press, 2001), p. 53 and p. 55.

⁵ Case 4/73 Nold KG v. Commission [1974] ECR 491.

⁶ Case 44/79 Hauer v. Land Rheinland-Pfalz [1979] ECR 3727.

⁷ The Maastricht Treaty was signed on the 7th February and entered into force on the 1st November 1993.

agreement with the ACP countries in Yaoundé in 1963 and then after the entry of the UK into the EC, since 1975 concluded agreements in Lomé⁸. Article 5 of the so-called Lomé IV Agreement of 15th December 1989 referred to respect for human rights, but it was only a reference. However, on the 4th November 1995 after the Maastricht Treaty entered into force, Article 5 was amended to rule that "...respect for human rights, democratic principles and the rule of law...shall constitute an essential element of the convention". The introduction of human rights clauses (i.e. essential element clauses) in international treaties indicates that human rights, the rule of law and democracy were becoming important in the context of the EU's external relations⁹. In addition, another amendment (366a paragraph 1) to the agreement regulates that "if one Party fails to fulfil an obligation in respect of one of the essential elements, the other Party may take appropriate steps, including, where necessary, the partial or full suspension of application of the convention". On the other hand, Article 224(m) rules support for institutional and administrative reform measures, with a view to democratisation and the rule of law. So far as the ACP countries comply with Article 5, they can get support. Once one of the ACP countries fails to fulfil their obligations, the country cannot receive any support from the EU. This is the so-called "carrot and stick" approach.

The EU has concluded such an agreement with not only the ACP countries but also other countries in the context of the enlargement policy, the neighbourhood policy, the development policy, the economic and technical cooperation and so forth¹⁰. Since May 1992, those agreements have included essential element clauses and at the same time non-compliance clauses. Where material breach of essential element clauses occurs, sanctions including suspension of support from the EU would be imposed on those countries. Such pairing of these clauses is becoming standard. Some variations of those two clauses were seen, for example, the so-called "Baltic clause" and "Bulgarian clause". The so-called Baltic clause requests immediate suspension, but on the other hand the so-called Bulgarian clause leads to a consultation procedure before the suspension. The European Commission showed a standard model in 1995¹¹. The Cotonou Agreement between the ACP countries and the EU and its Member States which was signed on 23th June 2000 is an example of the development of the form of the standard model of 1995¹². Article 9 paragraph 2 subparagraph 4 of the agreement, entitled "Essential Elements and Fundamental Element" rules, "Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this agreement." On the other hand, the non-compliance clauses of Article 96 and Article 97 regulate detailed consultation procedures and appropriate measures. The EU has endeavoured to promote democracy and respect for human rights and the rule of law in its external relations, especially after the Maastricht Treaty.

⁸ There are several Lomé agreements. The first Lomé agreement was signed in 1975. After that every five years a new agreement was signed.

⁹ COM(1998) 146, "Democratisation, the rule of law, respect for human rights and good governance".

¹⁰ COM(95)216, "On the inclusion of respect for democratic principles and human rights in agreement between the Community and third countries", pp.7-8.

¹¹ Ibid.

¹² OJ of the EU 2000 L317/3.

2. From the Maastricht Treaty to the Nice Treaty

(1) The Amsterdam Treaty and constitutionalism in the EU

The Maastricht Treaty referred to the guarantee of human rights and fundamental rights. On the other hand, the Amsterdam Treaty of 1999¹³ changed the EU Treaty.

At first, the Amsterdam Treaty added an article that the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States (Article 6 paragraph 1 TEU (old)). Secondly, the Treaty introduced sanctions including suspension of voting rights toward a Member State who violates those principles (Article 7 TEU (old)). Thirdly, it amended Article 46 TEU, which regulates the jurisdiction of the European Court of Justice (the ECJ). Before the Amsterdam Treaty, the ECJ had no jurisdiction over the EU Treaty, although it had jurisdiction over the EC Treaty. However, according to the amendment the Court had jurisdiction over Article 6 paragraph 2 TEU, respect for fundamental rights. Last, but not least, the Treaty amended Article 49 about accession.

At the Copenhagen European Council in May 1993 three conditions of accession were made clear. The first condition is a political criteria, the second condition is an economic criteria and the third condition is acceptance of “*acquis communautaire*”¹⁴. The political criteria are democracy, respect for human rights and minorities and the rule of law. The first condition of those Copenhagen accession conditions is included in Article 49 TEU (old). According to the article, candidate countries must respect the political principles that are regulated in Article 6 paragraph 1 TEU (old).

The amendment states that the political principles in Article 6 paragraph 1 TEU (old) apply for both Member States and the candidate countries in the same way. All countries must comply with respect for human rights and democracy whether they are candidate countries or already members of the EU.

(2) The Nice Treaty and constitutionalism in the EU

The Nice European Council in December 2000 agreed with the text of the Nice Treaty. At the same time, the charter of the EU fundamental rights was declared solemnly by the European Parliament, the Council of the EU and the Commission. The charter is a document that includes a preamble and 54 articles. At that time, the charter was not made binding, but it showed at least that the EU is based on democracy and respect for human rights.

The Nice Treaty of 2003¹⁵ amended the TEU and the TEC further. It strengthened the sanctions article in the case of violation of political principles in Article 6 TEU (old) so that it could be applied in reality because a far right party, the Austrian Freedom Party, whose leader was Jörg Haider participated in the government of the Austrian People's Party and several Member States of the EU imposed mild diplomatic sanctions on Austria¹⁶.

¹³ The Amsterdam Treaty was signed on the 2nd October and entered into force on the 1st May 1999.

¹⁴ “*Acquis communautaire*” means all that the EC/EU has developed, EU Treaties, EU measures, case law and others.

¹⁵ The Nice Treaty was signed on the 2nd October and entered into force on the 1st February 2003.

¹⁶ Cf. Andrew Williams, *The Ethos of Europe*, 2010, Cambridge University Press, pp. 90-91.

(3) Efforts for Constitutionalism in the EU's external relations

After the Amsterdam Treaty of 1999, which was signed in 1997, administrative reorganisations created a new Directorate and Commissioner for External Relations¹⁷. According to the report of the Commission, for the first time in the history of the Commission, a single figure would be responsible for promoting of human rights and the human rights and democratisation unit within the Directorate has assumed worldwide responsibility for human rights, and for coordination within the Commission¹⁸. In 2001 the Commission published a communication document and wrote the mainstreaming of human rights and democratisation objectives¹⁹. Receiving this Communication document, the working Party on Human rights in the Council (COHOM) consulted with the development Co-operation Working Party and prepared a draft Council decision on the role of the EU in promoting human rights and democratisation in third countries²⁰. The document revealed the following views of the Council: the process of "mainstreaming" human rights and democratisation objectives into all aspects of EU external and internal policies should be intensified. Human rights and democratisation should systematically and at different levels be included in all EU political dialogue and bilateral relations with third countries. In addition, EU measures and mechanisms, such as political dialogue, human rights clauses and financial incentives should be used²¹.

II. *Establishment of Political Principles for External Action of the EU*

After the Maastricht Treaty, the Amsterdam Treaty and the Nice Treaty political principles such as democracy, respect for human rights and the rule of law have been strengthened and consolidated in the European Union. Constitutionalism in the EU reached a satisfactory state in one respect, despite failing to reach the ultimate goal, but the problems of democracy deficit remain. Then, the EU began to extend political principles in its external action. The decisive factor for external action is the introduction of Article 21 by the Lisbon Treaty of 2009²². Below, the codification of Article 21 is described.

1. European Convention and Constitutional Treaty

The Nice Treaty was signed on the 26th February 2001, and in December of the same year the Laeken Council published a declaration on the future of the EU. In this declaration it was decided to hold a convention on the future of Europe in order to examine issues that were not solved in the Nice Treaty. The convention began on the 28th February 2002 and submitted a draft treaty establishing the European Constitution to the European Council and ended its task on the 10th July 2003.

¹⁷ COM(2000)726, "Report from the Commission on the implementation of measures intended to promote observance of human rights and democratic principles in external relations for 1996-1999", p. 87.

¹⁸ Ibid., pp. 87-88.

¹⁹ COM(2001)252, "The European Union's role in promoting human rights and democratization in third countries".

²⁰ Council of the European Union, Doc. 9547/01, 19 June 2001.

²¹ Ibid., p. 5.

²² The Lisbon Treaty was signed on the 13th December 2007 and entered into force on the 1st December 2009.

(1) Opinions of some members before the draft

Eleven working groups were present at the convention. One of them was the group for external action. One of the tasks of the group was to define and formulate general principles and objectives of the external policy of the Union. The summary of the assembly of the convention reported, “many stressed that the values which were at the heart of the Union were themselves an argument for a greater role globally, and that these values should underpin and inform the Union’s external policies. Several members also mentioned the need to respect the fundamentals of the UN Charter”²³.

The vice-president of the convention, the chairman of Working Group VII “external Action”, Jean-Luc Dehaene said that the Convention’s plenary debate confirmed that the EU had much to gain from acting collectively on the international scene and only a strong and united Union can protect its political and economic interests and defend the values, which are at the heart of the Union itself²⁴. Member of the Convention and the Member of the EP, Elmar Brok sent a letter to Dehaene stating, “only a foreign policy based on the consolidation of rights and freedoms and on the affirmation of the principles of democracy and the rule of law throughout the world, and in particular in all third countries with which the EU maintains special relations via cooperation and association agreements, will enable the Union to overcome threats to peace, stability and freedom”²⁵. In addition, a Member of the convention, Alain Lamassoure, expressed his opinion that if the EU has comprehensive competence in external policy, the EU must clarify its aims and principles to the world²⁶.

(2) Some opinions of members about the draft

The working document of Working Group VII of 15 October 2002 showed a draft text on the principles and objectives of EU external action²⁷. The document became a base of the later Article 21 of the TEU. There were some comments about the draft.

According to a paper of a member of Working Group VII, Michalis Attalides submitted an amendment proposal that adds that “it will work on the basis of and aiming (*sic.*) to contribute to the implementation of United Nations Security Council Resolutions, as these are the strongest expression of the search for multilateral solutions and the clearest expression of the will of the international Community on evolving international issues”²⁸. Michel Barnier commented that it seemed in fact necessary to clarify the principles of the external action in the constitutional treaty and define the content of common external policy²⁹. Bubby McDonagh expressed his opinion that “the task of defining the principles and objectives of the European Union in its external action is both complex and sensitive...a statement of this kind will represent not only a definition of the basis for the Union’s external relations but also a statement of these principles to the Union’s citizens, and to the outside world. ... We should also make clear that the fundamental values which they share in the Union are universal values

²³ CONV 200/02, 16 July 2002, p. 3.

²⁴ CONV 252/02, 10 September 2001, p. 2.

²⁵ Working Group VII, Working document 2, 24 September 2002, p. 2.

²⁶ CONV 351/02, le 3 Octobre 2002, p. 2.

²⁷ Working Group VII, Working document 7, 15 October 2002.

²⁸ Working Group VII, Working document 12, 28 October 2002, p. 2.

²⁹ Working Group VII, Working document 13, le 28 Octobre 2002, p. 2.

shared by peoples around the world”³⁰.

(3) From final report to the constitutional Treaty

The preliminary draft final report of 8 November 2002 states that “several members pointed to the need to better define [in the Treaty] [in a solemn declaration] the underlying principles and general objectives of all areas of EU external action, in a manner that would be clear to the public and the EU’s partners” (para. 9) and “once the overall principles and objectives were set, it would be easier for the EU to define common interests and agree upon a strategy to defend them” (para. 12)³¹.

In the document of 16 December 2002 the final report of Working Group VII on External Action presented some ideas³². The first idea is that there was a very large consensus in the Group on the need to define in the Treaty the underlying principles and general objectives of EU external action, in a manner that would be clear to the public and the EU’s partners³³. The second idea is the recognition that the central question was not whether the Union had a role to play but how it should organise itself in order to effectively and coherently promote fundamental values, defend common interests and contribute to the overall objective of global peace, security, and sustainable development³⁴. The third idea was the recognition of the need for better definition in the Treaty of the underlying principles and general objectives of all areas of EU external action, in a manner that would be clear to the public and the EU’s partners³⁵.

Following the final proposal of Working Group VII, the draft constitutional treaty which was submitted on the 10th July 2003 has Article III-193 under Chapter I “provisions having general application”, the Title V “the Union’s external action”. The Article rules on political principles that are based on that proposal. The draft was signed later in the form of a treaty establishing a constitution for Europe on the 29th October 2004. The constitutional treaty includes political principles in Article III-292 which is identical to Article III-293 in the draft.

2. The Lisbon Treaty and Constitutionalism in the EU

The constitutional Treaty was rejected in the Netherlands and France by referendum, which prevented it from entering into force across the EU. Instead, a reform treaty was codified and it was signed as the Treaty of Lisbon on the 13th December 2007 and it entered into force on the 1st December 2009. The Treaty of Lisbon avoids including elements of a “State”, which can be seen in the Constitutional Treaty, but takes over its material content. Therefore, the Treaty of Lisbon changed the EU Treaty and the EC Treaty substantially and the changes are also related to democracy and respect of human rights and so forth.

Although the Maastricht Treaty, the Amsterdam Treaty and the Nice Treaty promoted constitutionalism such as democracy, respect of human rights and the rule of law in the EU, the Lisbon Treaty advanced it further significantly.

The first change is that the charter of fundamental rights of the EU now has the same legal

³⁰ Working Group VII, Working document 25, 11 November 2002, p. 2.

³¹ Working Group VII, Working document 21, 8 November 2002, p. 4.

³² CONV 459/02, 16 December 2002.

³³ *Ibid.*, p. 2, para. 2.

³⁴ *Ibid.*, p. 11, para. 2.

³⁵ *Ibid.*, p. 13, para. 10.

value as the EU Treaty and the Treaty on the functioning of the EU (the TEC became TFEU). The second change is that the accession of the EU to the European Convention for the protection of Human Rights and Fundamental Freedoms is ruled in Article 6 of the TEU. Thirdly, the new title, “Provisions on Democratic Principles”, is introduced in Title II of the TEU. Fourthly, the Treaty of Amsterdam ruled that some principles such as freedom, democracy, respect for human rights and the rule of law are common to the Member States, while the Treaty of Lisbon rules, “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights ... These values are common to the Member States...” (Article 2 of the TEU). This means that the Treaty of Lisbon upgraded principles to values. According to Cremona, “Values are part of the EU’s constitutional development and a representation of its collective identity”³⁶. For the first time, the TEU has regulated common values for the EU and its Member States. Fifthly, the most important change is that in external action. Before the Treaty of Lisbon, articles that are related to external action could only be found here and there in the TEU and TEC. However, the Treaty of Lisbon systematised related articles under Title V “General provisions on the Union’s external action and specific provisions on the common foreign and security policy” of the TEU and Part Five “the Union’s external action” of the TFEU. Political principles with which the EU must comply are regulated in Article 21 TEU.

3. Article 21 TEU and Constitutionalism in the EU’s External Relations

Article 21 of the TEU supersedes Article III-262 of the constitutional treaty as referred to above. The convention recognised the importance and necessity of formulating general principles and objectives for external action already at the very beginning and the working document of the Working Group leads to the Article 21 with some amendments.

Article 21 paragraph 1 subparagraph 1 rules, “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.”³⁷

The above mentioned discussion of the European convention described that clear defined political principles in external relation makes the EU strengthen and the clarification of those principles to the world is necessary. Such an understanding is codified in Article 21 of the TEU.

Respect for human rights and democracy are regulated in Article 130u of the TEC for the development cooperation after the treaty of Maastricht and Article 181a paragraph 1 of the TEC for the economic, financial and technical cooperation after the Treaty of Nice. Those provisions in both articles have been deleted and inserted in Article 21 of the TEU together. Political principles in Article 21 apply now not only for the development cooperation and the economic, financial and technical cooperation, but also for all external action.

³⁶ Marise Cremona, “The Union as a Global Actor”, 41 *CMLRev.* 2004, p. 553, p. 558.

³⁷ Underlines by author.

III. *Article 21 TEU and International Agreements*

1. The role of Article 21 TEU

(1) Legitimation for application of political principles in the EU's external relations

While Article 2 of the TEU rules on values that are common to the Member States, Article 21 does not use the word “values”, but the word “principles”, although the above-mentioned proposal of Working Group VII used not principles, but values. The contents of values in Article 2 and those of principles in Article 21 are mostly overlapping, but there are some differences. For example, the phrases “universality and indivisibility of human rights and fundamental freedoms”, and “respect for the principles of the United Nations Charter and international law” can be found only in Article 21, not in Article 2 TEU.

The EU takes those words into consideration when it includes human rights clauses in agreements with third countries and the inclusion of those words was proposed in the convention for the European Constitution. The European Commission expressed its opinion in the COM document of 1995 that three principles, arising from the Universal Declaration of Human Rights, are universality, indivisibility and interdependence between human rights, democracy and development³⁸. Further, the Commission said that the inclusion of “essential element” clauses of the agreement would promote the subject of shared interest and an integral part of the dialogue between the parties and this approach should be seen not as imposing conditions, but in the spirit of a joint undertaking to respect and promote universal values³⁹.

The reference to the United Nations Charter and international law in Article 21 of the TEU and the phrase, “The Union seeks to develop relations and build partnerships with third countries, and international, regional or global organisations that share the principles referred to in the first subparagraph” are meaningful. With those phrases, the EU positions itself as a member of the international community and tries to legitimize its external action, insisting that political principles apply not only for the EU, but have universality.

It is uncertain whether political principles will contribute to constitutionalism in the international community, although the Kadi case⁴⁰ by the ECJ contributed to it largely⁴¹ and the constitutionalism in the EU has certainly affected the world. The reason why is that the application of political principles could be a means for normative power⁴².

(2) The meaning of the existence of Article 21 TEU

The EU has included human rights clauses in agreements with third countries since the

³⁸ COM (95) 567, “The European Union and the external Dimension of Human Rights policy: From Rome to Maastricht and Beyond”, p. 10.

³⁹ *Ibid.*, p. 16.

⁴⁰ Joined cases C-402/05P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351.

⁴¹ Gráinne de Búrca, “The ECJ and the international legal order: a re-evaluation”, in Gráinne de Búrca/J.H.H. Weiler (ed.), *The worlds of European Constitutionalism*, 2012, Cambridge University Press, p. 105 and p. 110.

⁴² Cf. Henri de Waele, *Layered Global Player*, 2011, Springer, p. 96; Cf. Gráinne de Búrca, “EU External Relations: The Governance Mode of Foreign Policy”, in Bart Van Vooren/Steven Blockmans/Jan Wouters (ed.), *The EU's Role in Global Governance*, 2013, Oxford University Press, p. 39, p. 40.

1990's. The EU realises today a legal basis for those practices by the codification of those political principles in Article 21 of the TEU. In addition, with the existence of Article 21 TEU the EU can clarify its values and objectives toward the international community.

Until now, the EU has not concluded such agreements with human rights clauses with developed countries, which do not receive economic assistance or unilateral economic facilities, but at present, the EU has a “pretext” for applying of political principles in international negotiations and the international scene.

(3) Human rights clauses to political clauses

Not only democracy, respect for human rights and the rule of law, but also solidarity, and respect for the principles of the United Nations Charter and international law are enumerated in Article 21 of the TEU. Documents of the EU during from the Treaty of Maastricht to the Treaty of Nice used the phrase “human rights clauses”, but now, the phrase “political clauses” is often used and the issues are related not only to human rights, but also fight against terrorism, international criminal court, nuclear non-proliferation, good governance in the field of finance, small arms and light weapons and so forth.

2. The Practices after the Treaty of Lisbon

(1) Practices in documents

Although the Treaty of Lisbon entered into force on the 1st December 2009 and Article 21 of the TEU is binding from that date, the practices after the signing of the Treaty of Lisbon, but before the entry into force of the Treaty are here taken into consideration.

For example, a document of the Council of the EU includes the phrase “political clauses in agreements with third countries” in its title⁴³. The document states the Council decided that it was appropriate to include horizontal clauses of a political nature (human rights, democracy, the rule of law, fight against terrorism, non-proliferation of weapons of mass destruction, International Criminal Court and small arms and light weapons) systematically in agreements with regions and third countries⁴⁴. It is also stated that political clauses compose an important element in the external policy of the EU which reflects its values⁴⁵. The annex of the document reported that the Council decided to include certain clauses of a political nature in the agreements that the EU and its Member States have concluded with the region and third countries in order to place the external relations of the EU in a larger political context⁴⁶. This document implies that the Council tends to include political clauses in the agreements and place the external relations of the EU in a political context.

Further, the document of the 27th February 2009, entitled “Reflection paper on Political Clauses in agreements with third countries”, states that political clauses are an important part of an emerging core of the EU's identity in conducting foreign policy and they reflect EU values and strategic interests⁴⁷. The document also states that among the political clauses that pursue

⁴³ Conseil de l'Union Européenne, Doc. 17370/08, le 16 Décembre 2008.

⁴⁴ Ibid., p. 1.

⁴⁵ Ibid., p. 2.

⁴⁶ Ibid., p. 5.

⁴⁷ Council of the European Union, 7008/09, 27 February 2009, p. 2.

various foreign policy objectives, the human rights, democracy and the rule of law clauses have a specific significance and represent the core of EU values and this stems directly from the treaties and is part of the foundations of the EU. Furthermore, the document further states that the Council decide gradually and through a series of decisions on each individual clause to include horizontal clauses of a political nature systematically in agreements with third countries and in order to have a comprehensive framework with third countries covering the main areas of cooperation, including political cooperation, the EU has a preference to enter into framework agreements prior to concluding sector agreements that in principle do not include political clauses⁴⁸.

It shows that the EU's strategy is to apply political principles to the third countries to the extent possible. It leads to the strategy of the EU to conclude not only free trade agreements, but also politically binding agreements.

(2) The agreement between South Korea and the EU

South Korea and the EU concluded a free trade agreement on the 6th October 2010, but also concluded a framework agreement on the 10th May 2010⁴⁹. The framework agreement is a comprehensive agreement that includes political elements. Some sentences have been selected.

Article 1 paragraph 1 rules, "The Parties confirm their attachment to democratic principles, human rights and fundamental freedoms, and the rule of law. Respect for democratic principles, and human rights and fundamental freedoms as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, which reflect the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement"⁵⁰.

On the other hand Article 45 paragraph 3 is the so-called non-compliance clause. It rules, "If either Party considers that the other Party has failed to fulfil its obligations under this Agreement, it may take appropriate measures in accordance with international law. Before doing so, except in cases of special urgency, the Party shall present all the information required to the Joint Committee and hold consultation on the situation. The Parties shall hold consultations within the Joint Committee and, if both Parties agree, these consultations may be facilitated by a mediator appointed by the Joint Committee".

This is the style of "carrot and stick" approach once more. At that same time, the framework agreement is new in regulating detailed modalities for implementation in Article 45 and in paragraph 2 of the joint interpretative declaration concerning Articles 45 and 46.

There is another characteristic of the framework agreement. Article 1 paragraph 2 regulates, "The Parties confirm their attachment to the Charter of the United Nations and their support for the shared values expressed therein"⁵¹. Further, Article 2 paragraph 2 states, "Building on their well-established partnership and shared values, the Parties agree to develop their cooperation and dialogue on all issues of common interest"⁵². And Article 3 paragraph 1 rules, "A regular political dialogue, based on shared values and aspirations, will be established

⁴⁸ Ibid.

⁴⁹ OJ of the EU 2013 L20/1.

⁵⁰ Underline by author.

⁵¹ Underline by author.

⁵² Underline by author.

between the Republic of Korea and the European Union”⁵³. The first paragraph of the Joint Interpretative Declaration concerning Articles 45 and 46 states, “The Parties are democracies. They wish to work together to promote their shared values to the world. Their Agreement is a signal of their shared determination to promote democracy, human rights, non-proliferation, and counter-terrorism throughout the world. The implementation of this Agreement between the Parties sharing the same values shall therefore be based on the principles of dialogue, mutual respect, equal partnership, multilateralism, consensus, and respect for international law⁵⁴”.

The framework agreement repeats and emphasises the shared values of both Parties. This comes from Article 21 paragraph 1 subparagraph 2 of the TEU, “The Union shall seek to develop relations and build partnerships with third countries...which share the principles referred to in the first subparagraph.

To apply political principles in external action of the EU is regulated in Article 21 of the TEU, so there is a high probability that the EU will request developed countries such as Japan, Canada, Australia and the USA to conclude such a framework agreement in the near future, although those countries do not need unilateral financial assistance from the EU.

IV. *Conclusions*

The policy of the EU, insisting that democracy, respect for human rights and the rule of law and other political principles are important, did not start with the establishment of the European Community. With the development of constitutionalism, i.e. the guarantee of democracy and human rights the EU considers those political things as principles or values of the EU. Based on those values and cementing unity, the EU has been strengthened at first internally, and then also externally.

At first, there were some practices to include human rights clauses in agreements with third countries. Amendments of the EU Treaties have supported these practices and given them a legal basis. Insertion of the new Article 21 by the Lisbon Treaty enshrines the practices and the amendments in the treaty. Article 21 of the TEU means not only that it gives the EU a legal basis or legitimate reasons for applying political principles to third countries, but also that the EU is obliged to apply them.

Although the EU has established a legal basis for application of those principles in external action, the execution of that strategy is not always effective. Facing this fact, the Council of the EU adopted a Strategic Framework on Human Rights and Democracy with an Action Plan for putting it into practice on the 25th June 2012⁵⁵. The High Representative proposed the appointment of an EU Special Representative on Human Rights in order to implement them⁵⁶. This background lies in Article 21 of the TEU⁵⁷. The European Council of 28th and 29th June 2012 welcomed the adoption by the Council of the EU Strategic Framework and the related Action Plan and also underlined the importance of keeping human rights and

⁵³ Underline by author.

⁵⁴ Underline by author.

⁵⁵ Council of the European Union, Doc. 11737/12, 25 June 2012.

⁵⁶ *Ibid.*, p. 3.

⁵⁷ *Ibid.*, p. 3; Council of the European Union, Doc. 11855/12, 25 June 2012, p. 4.

democracy at the centre of EU foreign policy⁵⁸.

Mainstreaming of human rights and democracy in external relations of the EU will be strengthened based on Article 21 of the TEU. Today, even developed countries including Japan should negotiate with the EU from the presupposition that the EU will insist on the insertion of political principles in agreements and it is important to find common shared values and to contribute to constitutionalism in the international community in cooperation.

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⁵⁸ European Council, Doc. EUCO76/12, 29 June 2012, p. 6.