

THE INTERNATIONAL ORGANIZATIONS  
RESEARCH GROUP

# EUROPE'S SOCIAL AGENDA

Why is the European Union  
Regulating Morality?

Maciej Golubiewski

*Catholic Family & Human Rights Institute*

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## PREFACE

Every year various European Union (EU) bureaucracies openly fund and support policies and programs regarding the family and the beginning and end of human life, often despite heated controversy and objections by EU member states. This “moral regulation” from Brussels occurs even though the promotion of many of those social policies is virtually absent from the EU’s mandate. What explains this?

In this International Organizations Research Group (IORG) White Paper, Maciej Golubiewski finds that the “moral regulation” agenda in the European Union is the result of a confluence of several social, political, and legal trends over the last three decades, including an ascending influence of powerful non-governmental organizations (NGOs), increasing numbers of EU bureaucracies concerning themselves with moral and social issues, and the diversification of legal and bureaucratic venues for promoting human rights, among other trends.

European national leaders have allowed centralized control of their most treasured human institutions such as marriage and family to advance in part because of a misplaced belief that their national laws are protected by the principle, if not the practice, of subsidiarity, by which member States cede only minimally necessary decision making power to Brussels. As Golubiewski shows in his analysis, however, this assumption is increasingly out of step with facts on the ground.

Previous IORG White Papers have identified similar trends at the United Nations and other regional institutions. This analysis of the EU should therefore prove valuable for any policy maker or scholar concerned with the influence of international law and institutions on national laws and policies, especially as they relate to moral and social issues. As Golubiewski cautions us, “Only timely and effective action by national capitals to assert their rights can protect and preserve national traditions of marriage, family, and human life – arguably the most important issues of our time.”

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## EXECUTIVE SUMMARY

Starting much earlier, but especially since the inclusion of social policy chapters in the revised European Union (EU) treaties in the 1990s, bureaucracies within the EU have engaged themselves in sponsorship and funding of controversial social policy initiatives. The initiatives are based on an expansive view of treaty mandates, and are often undertaken with limited knowledge and consent on the part of the member states. This is a process of “moral regulation,” a term used in this study to encompass all EU social and human rights policies and initiatives that intrude, or potentially intrude, on democratic national jurisdiction over moral matters. It is the result of a confluence of various trends attendant to EU integration and European social, political and legal developments.

### **Overview**

Why does the EU involve itself in the moral regulation of member states? The general cultural context of Europe is important. The EU up until the recent enlargement has reflected general secularization trends prevalent in Western Europe. These trends point to value changes, which in turn affect policy. The generally favorable atmosphere surrounding the so-called gender, reproductive health and anti-discrimination agendas is reflected in all the areas of concern mentioned throughout the paper. These issues, although not most salient for populations and governments of the member states, benefit from the attention of well-funded NGOs who have gained privileged partner status within and access to the EU bureaucracy. These NGOs are the avant-garde of the broad value shift away from traditional, often religiously inspired, values. The same goes for mainstream political parties. In particular, Christian Democratic parties have seen the erosion of their religious voter base and thus have moved away from more traditional conceptions of social life.

The ideological bias is further compounded by the legal and institutional set up of the European Union. Over the past 20 years, with consequent treaty revisions, there has been a significant increase in the number of EU competences as well as policy instruments and decision mechanisms. This creates an ideal opportunity for policy specialists (NGOs) and their counterparts in the EU bureaucracy to develop “policy communities” operating in relative obscurity, far removed from the oversight by national authorities. The European institutions benefit immensely from expertise and outreach done by their NGO cooperators, who also lend them a measure of legitimacy. This interest group-driven, almost corporatist, system of social representation on the issues of human life and sexuality suffers from the virtual monopoly

of NGOs that are the drivers of the current value change away from traditional conceptions of social life. Policy research long ago ascertained that activists tend to be more extreme than “the man on the street.” Due to the “democratic deficit” of a weak European Parliament and scant influence of national parliaments, it is the privileged Brussels-based activists (NGOs) that have substantial leverage over the EU policy process. Conservative policy makers, who happen to be recruited mostly from among the members of the European Parliament, are thus left without these crucial policy advocates and liaisons.

Another influence on the dynamics of moral regulation is EU enlargement. Treaty revisions in 1992 and 1997 that prepared the ground for EU’s activity in the realm of social policy and human rights reflect the pre-enlargement consensus. The enlargement of the EU to the twelve new member states from Central and Eastern Europe shifted the ideological balance in the EU. Yet the so-called EU conditionality process was responsible for inhibiting political competition around contentious issues in candidate member states before the accession.<sup>1</sup> Now, the more controversial aspects of the European law such as its “human rights” agenda provoke political tension in many Central and Eastern countries.

Though EU moral regulation takes place outside explicit legal boundaries, the intent of this analysis is not so much to point to illegality of EU actions as it is to turn the attention towards a prevailing liberal tilt of the EU’s established social policies that touch on areas of human life and sexuality and its consequences. The first part of the analysis examines the venues in which issues of human life and sexuality are influenced: The European Commission’s “community action programs” and NGO involvement in their creation and implementation; The operation of EU quasi-regulatory agencies and “expert networks;” The role of the European Parliament; and The EU Charter of Fundamental Rights.

## Purpose of the Study

The paper has three general purposes. First, it aims to clarify what the European Union, through its various bodies, actually does in policy realms that touch on issues of human life and sexuality. Secondly, it proposes some explanations for these activities. Finally, it attempts to correct the view, often held by those broadly sympathetic to the cause of moral conservatives, that the existing legal and institutional framework of the EU ensures proper oversight

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1 Grzymala-Busse, A. and A. Innes, *Great Expectations: The EU and Domestic Political Competition in East Central Europe*, EAST EUROPEAN POLITICS AND SOCIETIES 17 (2003), 64-73 and Mair, P., *Popular Democracy and EU Enlargement*, EASTERN EUROPEAN POLITICS AND SOCIETIES 17 (2003), 58-63.

of these activities by the primary principals of the EU treaties – the governments of the EU member states. The paper is therefore directed as much to those who would like to learn more about how the EU works, especially with regards to controversial social policy, as well as to those “fence sitters” in the Brussels policy community that are complacent or have given up on the effective, public and open pursuit of more conservative social policies in the European Union.

The paper touches on the legal framework of the EU. It tries to address those possessed of the legalistic mindset who believe that the treaty provisions effectively safeguard issues of human life and sexuality from too much intrusion by the EU bodies. Specifically, the argument points to the very weak letter of the subsidiarity principle, which for reasons of scale and effects, can be effectively abrogated in the policy process. Because of that, the paper argues that sovereignty serves as a much better principle of democratic control than subsidiarity because the locus of control remains closer to the more transparent and accountable institutions of the democratic state. In a sense, sovereignty avoids the pitfalls and difficulties of national monitoring of policy once the policy becomes even a shared competence of the EU. Put another way, given the cultural and institutional make up of the Brussels milieu, the chance for successful countervailing action along traditional lines from member state capitals is very slim once a certain competence finds itself into a new revision of the treaty.

## **EU Institutional Structure and Governance**

Arguably the most important power in the EU is agenda setting power. The Council of Ministers, a body consisting of national ministers, sets the long-term agenda, while the independent bureaucratic body, the European Commission, initiates and writes drafts of legislation. The Commission is the main driver of European integration. The Council and the European Parliament amend Commission drafts. The Commission, unlike a government, does not depend on a political mandate from the Parliament and is only weakly controlled by the Council. The European Court of Justice is an activist court that has sought to establish its supremacy over national courts and expanded its jurisdiction to rule in matters of human rights. A principle of subsidiarity that is supposed to guard local competences is weakly incorporated in the treaties, and can be overridden for reasons of scale or effects of proposed EU action. Treaties outline numerous competences of the EU in areas of social policy, gender and non-discrimination. The Commission operates inter-departmental Fundamental Rights, Anti-Discrimination and Equal Opportunities Group that assists in drafting legislation in those areas. In drafting legislation the Commission engages well-positioned NGOs and

NGO platforms in a form of “civil dialogue.” The Commission then relies on “community action programs” that promote the Commission’s agenda in the member states often through the use of Commission sponsored NGOs.

## **EU Positions on Human Rights and Religion**

The EU as an institution is not a member of the Council of Europe, which is the plenary body of the European Convention on Human Rights (ECHR). Nevertheless, the EU treaties assure the respect for the ECHR and contain clauses that allow for suspending the rights of EU member states if a member state is in persistent breach of “the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.” Nevertheless, the EU Charter of Fundamental Right has been annexed to the Nice Treaty, which supposedly only lists extant rights, but in fact changes the language of the rights concluded in the ECHR, and is controversial as to the scope and the justiciability of its provisions. The European Court of Justice had established case law that comes close to redefining the nature of marriage and has expanded its jurisdiction to cover not only community body actions but also state actions in the area fundamental rights.

The EU has also established a controversial Fundamental Rights Agency in Vienna to monitor the state of human rights observance within the member states. It replaces the obscure advisory body called the Network of Independent Experts on Fundamental Rights, whose contentious opinions on freedom of conscience of doctors not willing to perform abortions derailed the Slovakian-Vatican concordat in 2006. The EU maintains a symbolic dialogue with religious organizations through the Bureau of European Policy Advisers by the President of the European Commission. The EU treaties contain an annexed and non-binding Declaration No.11, which states that the EU protects the status of churches under national laws. The EU also allows funding organizations “connected with reflection at European level on ethical and spiritual foundations of the building of Europe,” but expanded it to all organizations of general European interest. The new Reform Treaty, which incorporates the EU Charter, will be up for ratification in 2008.

## **Family, Education, and Sexual Ethics**

The European Commission directorates are actively involved in sponsoring programs aimed at moral regulation. The Employment, Social Affairs and Equal Opportunities Directorate (DG EMPL) sponsors competitions and publicity campaigns aimed at influencing national norms surrounding the notions of family, appropriate sexual behavior, and even state-church relations. The Development Directorate (DG DEV) regularly funds NGOs involved in promoting “reproductive health and rights” in the developing

world, while the Public Health Directorate (DG HEALTH) promotes reproductive rights within the EU openly criticizing views to the contrary. The Culture and Education Directorate (DG EDU) cooperated in educational programs aimed at youth, often anti-religious in nature and overtly promoting norms contrary to religious sentiments of many Europeans. The Directorate of Research (DG Research) funded pro-abortion activities of the Network of European Women's Rights. These directorates have worked with organizations such as Marie Stopes International and the International Lesbian and Gay Association-Europe. The latter is officially funded by the anti-discrimination unit of DG EMPL. Other privileged NGO groups which explicitly support legalization of abortion, such as the European Women's Lobby or the European Youth Forum, are routinely consulted and receive funding from these directorates. The Justice, Freedom and Security Directorate (DG JUST) oversees all activities in the areas of fundamental rights. Finally, the European Parliament regularly votes on non-binding, but symbolically important resolutions condemning traditional approaches to sex and family life.

## **Implications and Policy Recommendations**

Certain instruments such as the EU Charter of Fundamental Rights should not be ratified and become a part of the new Reform Treaty. More transparency and control should be exercised over sponsorship of NGOs inimical to national laws and policies which protect traditional norms on marriage and family life. Community programs that fund controversial initiatives as well as the Fundamental Rights Agency should be placed under the scrutiny of national governments, while the so-called advisory expert networks should be eliminated. Finally, the European Parliament requires more transparency and accountability to member states, beginning with recorded votes on controversial resolutions that allow citizens to determine the voting record of individual MEPs.

## **Conclusion**

Because of a confluence of various factors in EU formation and integration, bureaucracies in Brussels have successfully expanded the scope of moral regulation in Europe. This is happening even though the EU has, at most, only shared competence with the member states in matters of social policy. At the same time, many national leaders remain on the fence about whether or not to push back. This is due in part to a belief that EU member states will ultimately be protected from encroaching EU bureaucracies through the practical realization of subsidiarity. As this study demonstrates, however, the factors leading to concentration of power in Brussels are likely to persist

if not accelerate in the coming years. Subsidiarity, ill-defined and practically ineffectual on social policy matters, is unlikely to help. What is more, given the trends examined in this study, states will be less able to regain protection of their national laws and culture in coming years than they are today. Only timely and effective action by national capitals to demand transparency and accountability and to retain their authority on social policy can protect and preserve national traditions on marriage, family, and human life – arguably the most important issues of our time.

## INTRODUCTION: UNITY, BUREAUCRACY, AND HUMAN RIGHTS

Europe comprises 46 recognized states, of which 27 form the EU. Among 800 million Europeans only 493 million are part of the EU. The EU defines itself as “a family of democratic European countries, committed to working together for peace and prosperity.”<sup>2</sup> Its predecessor was the European Coal and Steel Community (ECSC), founded in 1951 by Belgium, France, Germany, Italy, Luxembourg and The Netherlands. The ECSC was an effort to reconcile the warring European nations by jointly managing the production of coal and steel – the raw materials of war – through a single body named “the High Authority.”<sup>3</sup> In 1957 the same countries signed the Treaty of Rome (otherwise known as the Treaty Establishing the European Community – TEC),<sup>4</sup> pledging to remove trade barriers and promote “the common market.”<sup>5</sup> Yet in agreement with the spirit laid out in the pre-amble to the Treaty of Rome, the common market was but a step towards the goal of “an ever closer union.”<sup>6</sup>

Through the 1992 Treaty of Maastricht, Europeans called into life the European Union in order to create a more political union. Thereafter, the EU ceased to exist only as a common market and has become a fledgling political union with ambitions for a constitutional polity. It is also recently that the EU has moved to establish itself as a guardian of fundamental rights in Europe and abroad with a new Agency of Fundamental Human Rights, directorates general dealing with issues of non-discrimination, equality, and fundamental rights, and an ambitious program of aid to developing countries. In all of these areas, the EU has become a source of financial and even political support to many NGOs that promote the legalization of abortion and are inimical to traditional forms of family and religion. It is the purpose of this paper to illuminate activities of the EU institutions in these controversial spheres that often escape the attention of commentators who still see the EU for what it predominantly is and has been – a treaty organization oriented to preserving peace and economic stability on the European continent.

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2 See PANORAMA OF THE EU, European Union Website (Sep. 7, 2006), [http://europa.eu/abc/panorama/index\\_en.htm](http://europa.eu/abc/panorama/index_en.htm).

3 TREATY OF PARIS 1951, [http://www.unizar.es/euroconstitucion/Treaties/Treaty\\_Paris.htm](http://www.unizar.es/euroconstitucion/Treaties/Treaty_Paris.htm).

4 TREATIES OF ROME 1957, [http://www.unizar.es/euroconstitucion/Treaties/Treaty\\_Rome.htm](http://www.unizar.es/euroconstitucion/Treaties/Treaty_Rome.htm).

5 *Id.* at Article 3(h).

6 Note 4 *supra.*, Preamble.

## Conservative Beginnings

It is difficult to assign a particular ideology to the founding of the EU. After the Second World War, there arose a consensus among both Christian Democratic and Social Democratic parties that peace can be achieved only by closer political cooperation of European countries. Still, in the 1950s and 1960s, in all of the original EU founding states, with the exception of France, Christian Democratic parties were almost constantly in power. Catholic politicians such as Alcide de Gasperi, Robert Schuman and Konrad Adenauer provided diplomatic impetus and political leadership in the early years of European integration. In their mind peace was to be achieved not “according to a single plan,” as advocated by totalitarian ideologies but “will be built through concrete achievements which first create a *de facto* solidarity,”<sup>7</sup> facilitating personal contacts among the citizens of European countries and allowing them unfettered pursuit of their creative and entrepreneurial talents. The essential element of the original project was that the High Authority (later to become the Commission) be run by government appointed officials from each member state, yet independently of particular national interest. In the ensuing decades, this project has achieved a tremendous success. Membership in the EU has conferred enormous economic benefits on its members, not least through a joint EU effort to help poorer European countries revitalize their economies. The creation of the so-called “structural funds”<sup>8</sup> in the second part of the 20<sup>th</sup> century carried on the project of economic regeneration initially provided by the American Marshall Plan. Both the mainstream left and the right can congratulate themselves on this achievement.

## Secularization and the Democracy Deficit

The first shake up of the European institutions came with the French President General Charles de Gaulle who reasserted the national principle (often called the intergovernmental model) in the European communities. Cooperative consensus was replaced by hard bargaining among national ministers trying to set up common policies. The Commission was eclipsed by traditional national interest-driven diplomacy. As the EU has expanded, it has also become much more culturally and politically diverse. In the meantime, the progressing secularization started to erode the political base of the Christian Democratic parties, which had started to lose elections in the 1970s and the 1980s and had to look for non-confessional bases of sup-

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7 THE SCHUMAN DECLARATION of 9 May 1950, [http://www.mic.org.mt/PR's/MIC%20Press/Official%20PRs/09052002\\_official.htm](http://www.mic.org.mt/PR's/MIC%20Press/Official%20PRs/09052002_official.htm).

8 European Commission Website, [http://ec.europa.eu/regional\\_policy/funds/prord/sf\\_en.htm](http://ec.europa.eu/regional_policy/funds/prord/sf_en.htm).



port. The events of 1968<sup>9</sup> introduced neo-Marxism on the European stage, which influenced the philosophical discourse about the European Union. The emergence of the New Left and alternative parties such as the Green party has moved the political agenda away from strictly economic concerns to focus on social issues. All of this naturally influenced the agenda of the EU, which after the 1992 Maastricht Treaty (specifically in the 1997 Amsterdam Treaty) has also turned to broadly understood social regulation. Of enormous significance is that fact that throughout the years the European Court of Justice (ECJ) has established its supremacy over national courts in matters conferred on the EU by the treaties.

For some current critics of the EU it has become an organization that serves as an effective instrument of national political establishments to legislate unpopular policies for which individual nations can then blame the EU at home. For others, the EU has evolved into an autonomous bureaucracy that invades national sovereignty. Both approaches take into account the fact that the EU is profoundly undemocratic, in that it is unaccountable and removed from effective democratic parliamentary control of the member states. The policies promulgated using the non-transparent EU decision making process regulate, and have potential to regulate (more or less directly), many areas usually reserved for national or local democratic deliberation. It thus merits careful scrutiny by those interested in preserving democratic national and local control over these policies and constitutional traditions.

## **EU Conditionality and the Recent Eastern Enlargement**

Sociological studies show that socially conservative attitudes towards the traditional family, sexual behaviour and abortion are quite pronounced in post-communist states.<sup>10</sup> If one were to take just the 25 million practicing Polish Catholics, it would equal in population the 7<sup>th</sup> largest country in the EU and form 5% of the whole EU population. The EU politics in the pre-enlargement era (before 2004) exhibited mainly a secular and a liberal bias

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9 The year 1968 (often called “the year of the barricades”) witnessed massive student unrest in all the major capitals of Europe, especially in Paris and Rome. The students, calling themselves “the New Left,” opposed what they saw as conservative curricula at their universities and demanded an anti-capitalist revolution. They often invoked neo-Marxist authors such as Herbert Marcuse, Jean-Paul Sartre and the writers of the so-called Frankfurt School. Daniel Cohn-Bendit, a head of the Greens group at the European Parliament, was one of the student leaders from that time.

10 Standard Eurobarometer 65, 2006; C. Wallace and L. Mateeva, *Attitudes to Gender Equality in the Context of Enlargement*, Presented at the Employment Research Unit Annual Conference, Management, Work and Organization in Post-socialist Societies, Cardiff University, Cardiff, UK, September 8–9, 2004; and at the ESPANET Conference, Oxford, UK, September 9–11, 2004.

due to the left-of-center value consensus in the old EU-15. It is crucial to note that the treaty revisions in 1992 and 1997 in the realm of social policy and human rights reflected that pre-enlargement consensus. The enlargement of the EU to the ten new member states from Central and Eastern Europe has shifted the ideological balance in the EU. Yet the so-called EU conditionality process was responsible for inhibiting political competition around contentious issues in candidate member states before the accession.<sup>11</sup> The pre-accession procedures such as the periodic reviews in the Joint Inclusion Memoranda hid controversial parts of the EU law from the eye of the population, and the carrot of economic benefits arguably made Central European governments rush through the process. Now, the more controversial aspects of the European law such as its “human rights” agenda provoke political tension in many Central and Eastern countries. Thus while there exist relatively traditional countries in Western Europe (Ireland, Italy, Spain), these countries had entered and had a chance to participate in the EU policy process long before the increase in EU’s social competences, which have diminished somewhat the political tension associated with the new social agenda of the EU in those countries.

## Moral Regulation and Human Rights

Moral regulation is a form of social regulation, which concerns non-economic aspects of public policy.<sup>12</sup> Some scholars<sup>13</sup> simply speak of moral politics, which tries to modify, shape and sanction individual behavior. Notably, moral politics can be championed by both the left and the right. Moral regulation is simply the attempt at preservation or transformation of a certain national/local culture through active social policy. Today, after consecutive treaty revisions, the EU institutions have acquired influence extending beyond economics into defense and internal security policies,<sup>14</sup> most importantly into the areas of social policy and the promotion of human rights.<sup>15</sup> These policy areas include some aspects of family, educational and cultural policy.

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11 Note 1 *supra*.

12 ALAN HUNT, *GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION*, Cambridge: Cambridge University Press, 1999; Rodger, J., *Family Policy or Moral Regulation*, *CRITICAL SOCIAL POLICY*, 15 (43), 1995.

13 P. KURZER, *MARKETS AND MORAL REGULATION: CULTURAL CHANGE IN THE EUROPEAN UNION*, Cambridge: Cambridge University Press, 2001.

14 TREATY OF MAASTRICHT 1992 also known as TREATY ON THE EUROPEAN UNION (TEU), [http://www.unizar.es/euroconstitucion/Treaties/Treaty\\_Maast.htm](http://www.unizar.es/euroconstitucion/Treaties/Treaty_Maast.htm),

15 TREATY OF AMSTERDAM 1997, [http://www.unizar.es/euroconstitucion/Treaties/Treaty\\_Amst.htm](http://www.unizar.es/euroconstitucion/Treaties/Treaty_Amst.htm).

Some EU initiatives seek to actively diminish the scope for regulation of these matters on the national level and promote alternative policies that clash directly with long-established cultural patterns of some member states. This is done by various initiatives in policy realms falling under the headings of justice (human rights), anti-discrimination, gender mainstreaming, equal opportunities, social exclusion and development. Most of these initiatives reflect general trends in Western societies and are broadly reflective of the moral consensus in West European states. Yet the EU has become a playground for lobbyists and interest groups who realize that by skillfully exploiting an already wide jurisdiction of the EU institutions they can advance and expand their agenda throughout Europe.<sup>16</sup>

One last point is in order. It must be remembered that the main guarantor of human rights in Europe is the Council of Europe, a different organization than the EU, which through its tribunal in Strasbourg oversees the proper observance of the European Convention of Human Rights in Europe (ECHR). All of the EU member states are signatories of the Convention and if the EU ever takes on a legal personality the EU itself might sign it. Still, it has to be remembered that it is the EU and not the Council of Europe that is the most advanced political pan-European organization. Most importantly, the EU's legislation has the power of national laws, while the EU's own budget can be effectively used in implementing EU's policies. Thus it is the EU and not the Council of Europe that is much more present in the consciousness and the everyday political reality of Europeans.

This paper is divided into three main sections. The first lays out the institutions and procedures whereby the EU social legislation and policy are made. The second section describes the general human rights framework within which policies of the EU operate, as well as lays out, in general terms, the EU's relationship with religion and religious organizations. The third section consists of the analysis of the initiatives of the EU's social and human rights agencies (Directorates General [DGs]) – the proposed as well as promulgated directives and regulations – as well as of the so-called “community action programmes”<sup>17</sup> that serve as implementation tools of already

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16 For example: the promotion of the free movement of persons is an effective and much better disguised way of enacting controversial social policy aimed at easing national moral restrictions on homosexual unions. Also, the recent agreement on the so-called Reform Treaty, which has replaced the failed EU Constitutional Treaty, has attached to it what would be a legally binding Charter of Fundamental Rights. The original constitutional project, with potentially negative consequences for the national sovereignty of EU member states, stalled after failed referenda in France and The Netherlands, and it is unclear whether the new Reform Treaty, which shares most features of the previous failed effort, will share the same fate.

17 For an example see PUBLIC HEALTH, European Commission Website, [http://ec.europa.eu/health/ph\\_overview/pgm2007\\_2013\\_en.htm](http://ec.europa.eu/health/ph_overview/pgm2007_2013_en.htm).

existing EU law. The discussion focuses on grant making and how the EU uses NGOs as an integral part of managing policies and implementing its budget. The paper concludes with an examination of the implications of the current trend and offers policy recommendations.

# EU INSTITUTIONAL STRUCTURE AND GOVERNANCE

The institutional structure of the EU makes the assertion of national prerogatives especially difficult. The EU, unlike the United Nations (UN), is not a mere inter-governmental body. It is akin to a federal state that, in contrast to the UN, has explicit regulatory and budgetary powers which directly impact the law and policy of its 27 member states.<sup>18</sup> Like its member states, the EU possesses its own court (the European Court of Justice – ECJ), parliament (the European Parliament – EP) and an executive branch (the European Commission – EC), which co-exist with still the most important political body: the Council of Ministers (the Council).

## Directives and Regulations

It is commonly assumed that ten to thirty percent of the laws of the member states derive from the directives and regulations promulgated by the EU.<sup>19</sup> It is, then, instructive to evaluate the EU's impact on national sovereignty, traditional family and religion in a way that focuses on how the institutions of the EU interpret their policy making mandate, which is contained in the continuously amended Treaty Establishing the European Community (TEC) and the Treaty on the European Union (TEU).<sup>20</sup> Yet the interpretation of the treaties by the EU institutions is not so much a legal as a political matter.<sup>21</sup>

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18 For a good introduction of the political evolution of the EU see James Caporaso, *The European Union and Forms of State: Westphalian, Regulatory or Post Modern?* JOURNAL OF COMMON MARKET STUDIES, March 1996, 29–52.

19 The number is established by convention. Ken Endo claims that the EU's laws form 30 percent of all, and 70 percent of business law in the United Kingdom (UK). Ken Endo, *The Principle of Subsidiarity: From Johannes Althusius to Jacque Delors*, HOKKAIDO LAW REVIEW, Vol. XLIV, No. 6 (1994). UK parliamentary answer gives the figure of 9 percent (written answer of Denis MacShane MP to a question from Mr. Davidson on EU Regulations. WA, Col 796–797 22/3/05). Other quantitative studies put the number at 20–30 percent of all national legislation: Edward C. Page (1998), THE IMPACT OF EUROPEAN LEGISLATION ON BRITISH PUBLIC POLICY MAKING: A RESEARCH NOTE, Public Administration 76: 803–809. Annette E. Toller (1995), EUROPAPOLITIK IM. Frankfurt: Peter Lang.

20 For the texts of the two consolidated treaties see: <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>

21 Since the Single European Act of 1986, the EU is the only international treaty-based organization to which the signatory states explicitly agreed to cede parts of their sovereignty. Regulations and directives are promulgated by a qualified majority vote by the member states in the Council and amended by a political majority in the EP. This marks the largest difference between the EU and the UN – the interpretation of the EU mandate has become a political (though not necessarily democratic), rather than a purely administrative, affair. <http://www.unizar.es/euroconstitucion/library/historic%20documents/SEA/Single%20European%20Act.pdf>.

While the legal acts are promulgated with the participation of national governments and political parties, the right of proposal and the powers of execution belong to the EC. Still, the EC can only start drafting the text of a potential law with permission of the member states, whose heads meet occasionally in the Council to set the long-term agenda for the EU as a whole. This does not stop the EC from initiating many legal initiatives since the Council guidelines are often general and allow for a wide margin of bureaucratic discretion. Political scientists have long regarded the power to set the agenda as one of the most important influences on the course of voting and the direction of policy.<sup>22</sup> What is more, Article 250 (2) of the TEC gives the EC a power to alter its legislative proposal at any time during the legislative process. These powers truly make the EC the main driver of legislation as well as the promoter of further European integration.

## The Principle of Subsidiarity

Before going on to demonstrate the EU's direct policy actions, it is worth visiting the issue of subsidiarity,<sup>23</sup> which, though spoken well of, does not seem to sit well at the center of European action. The principle of subsidiarity was enshrined into European law in Article 3B of the Maastricht Treaty of 1992 (Article 5 of the consolidated TEC), which promised:

In areas that do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, *only if and in so far as* the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.<sup>24</sup>

This sentence is preceded by one that limits the Community to the powers conferred on it by the Treaty and is followed by one that says that “any action by the Community shall not go beyond what is necessary to achieve the objectives of this treaty.”<sup>25</sup>

By the “*only if*” test of EU action, the burden of proof is placed on those who advocate action by the central body; but this negative is loosened by another guideline. The “*in so far as*” test envisages the possibility that the

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22 Richard D McKelvey, *Intransitives in Multidimensional Voting: Models and Some Implications for Agenda Control*, JOURNAL OF ECONOMIC THEORY 12 (1976): 472-82.

23 EUROPA GLOSSARY [http://europa.eu/scadplus/glossary/subsidiarity\\_en.htm](http://europa.eu/scadplus/glossary/subsidiarity_en.htm). and Report prepared for the Steering Committee on Local and Regional Authorities (CDLR), [http://www.coe.int/t/e/legal\\_affairs/local\\_and\\_regional\\_democracy/documentation/library/localregionalauthorities/55.pdf](http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/documentation/library/localregionalauthorities/55.pdf).

24 Note 14 *supra* Article 3B and Note 33 *infra* Article 5 TEC (emphasis added).

25 *Id.*

Community may well be in a better position to act. In this manner the clause opens the way to a reallocation of authority to the centralized government. Bavaria, one of the states in the German Federal Republic, was the main mover in getting the subsidiarity clause inserted into the Treaty. Traditionally Catholic and conservative, Bavaria's main goal seems to have been to limit the power of the EU.

Subsidiarity powers are enhanced in many fashions by the robust nature of regional power within about half the EU nations, where, for instance:

Decentralization of social assistance and services has had much greater impact than privatization in the last decades... In 2002, about half of the EU-15 regions were 'partner regions,' or regions with legislative powers (almost in half of the member states). Many of them have been very active in developing welfare programs with a clear vocation for 'policy Innovation.'<sup>26</sup>

Moreover, central EU bodies have played their part in strengthening regional structures:

The European Commission has also promoted regional development, and EU structural funds have opened up new development opportunities and additional resources to sub-state regions within decentralized systems... The harmonization of economic development has gone hand in hand with the decentralization of political institutions and the rationalization of welfare development.<sup>27</sup>

Two tendencies, then, co-exist within the EU: those which pull inwards towards centralization and those which pull outwards towards regional autonomies.

## Treaties and Basic Legal Instruments

All laws in the EU must have an explicit treaty basis. The original Treaty of Rome (1957)<sup>28</sup> was followed by the Single European Act (SEA, 1986).<sup>29</sup> These two treaties barely treated matters of social policy. The SEA aimed at liberalizing the common market. The EU acquired significant political authority in the matters of human rights in the 1992 Maastricht Treaty<sup>30</sup>

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26 Luis Moreno and Bruno Palier (2004), *The Europeanization of Welfare*, paper delivered at the ESPANET Conference, Oxford, UK, September 9-11, 2004, p.15.

27 *Id.* 18.

28 Note 4 *supra*.

29 THE SINGLE EUROPEAN ACT (SEA) 1986. <http://www.unizar.es/euroconstitution/library/historic%20documents/SEA/Single%20European%20Act.pdf>.

30 Note 14 *supra*.

and in social policy with the signing of the 1997 Amsterdam Treaty.<sup>31</sup> The Nice Treaty of 2000<sup>32</sup> was not revolutionary, and was meant to adopt the EU procedures for the entry of ten new members. The Treaty Establishing the European Community (TEC) is the consolidated version of the Rome, SEA, Amsterdam and Nice treaties; whereas the Treaty on the European Union (TEU) is the consolidated Treaty of Maastricht.<sup>33</sup> These two treaties, the TEC and TEU, specify the decision making mechanisms in the three policy “pillars” of the EU: internal, foreign and police/criminal (Figure 1). Most of the analysis presented here will focus on the first pillar as it is most developed and most removed from the control of the member states.

There are several titles in the TEC that deal at some length with the community’s prerogatives in the realm of moral regulation. All of them became part of the TEC in the 1997 Treaty of Amsterdam.<sup>34</sup> The body of EU *law* in the general realm of social policy, especially outside the realm of explicit employment relations, is relatively small. According to some commentators<sup>35</sup> it is comparable in volume to federal social legislation on the eve of the New Deal<sup>36</sup> in the United States.

Much of the most important EU legislation takes on two basic forms: directives and regulations. Regulations are specific pieces of law whose

31 Note 15 *supra*.

32 THE TREATY OF NICE 2000 <http://europa.eu.int/eur-lex/lex/en/treaties/dat/12001C/htm/12001C.html>.

33 Consolidated version of the TREATY ESTABLISHING THE EUROPEAN COMMUNITY (TEC). [http://europa.eu.int/eur-lex/en/treaties/dat/C\\_2002325EN.003301.html](http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html).

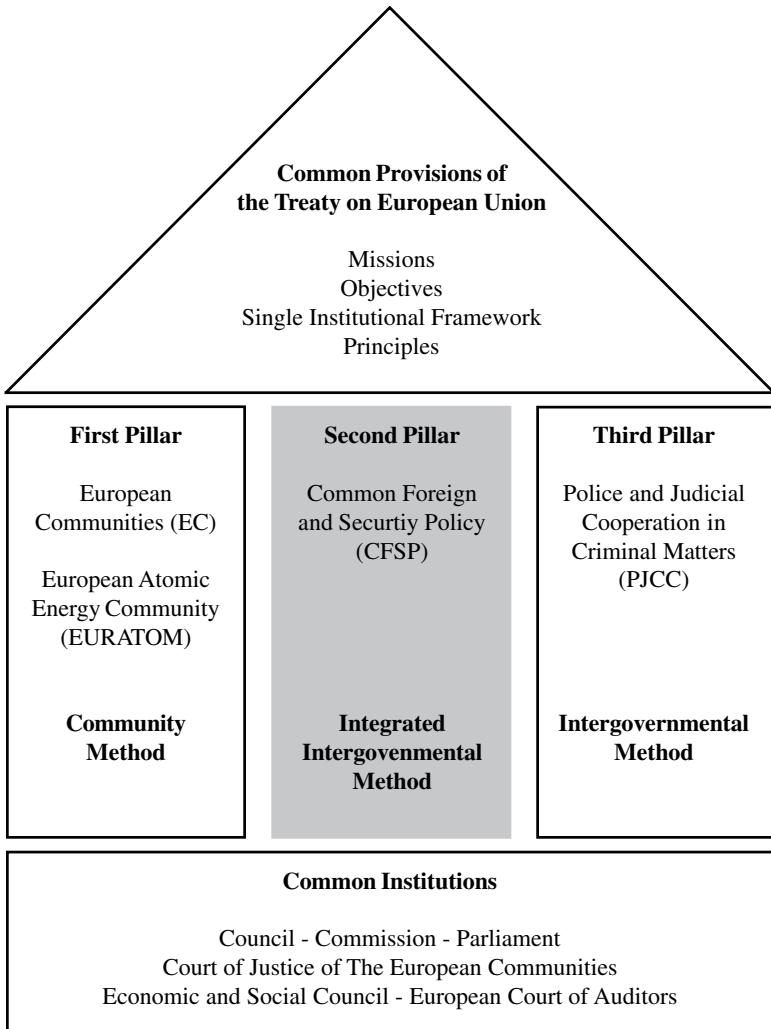
Consolidated version of the TREATY ON THE EUROPEAN UNION (TEU). [http://europa.eu.int/eur-lex/en/treaties/dat/C\\_2002325EN.000501.html](http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.000501.html).

34 They are: Title VIII on employment; Title XI on social policy, education, vocational training and youth; Title XII on culture; Title XIII on public health; and Title XX on development cooperation. (The TEU includes Title VI on police and judicial cooperation in criminal matters.) Other provisions of the TEC establish auxiliary institutions, such as the European Social and Economic Committee (ECOSOC), and funds such as the European Social Fund (ESF). Moral aspects are implicated in Articles 39–42 on the free movement of workers, as well in citizenship and right to residency clauses in Articles 17 and 18. Article 13 authorizes the EU to enact measures to combat any discrimination based on sex, race, ethnic origin, religion or belief, disability, age or sexual orientation. Some provisions contained in these articles can be enacted into law by unanimity only (Article 13, for example; and articles related to workers’ social security and the like).

35 P. PIERSON, ED., *THE NEW POLITICS OF THE WELFARE STATE*, Oxford: Oxford University Press, 2001; D B Robertson, *The Bias of American Federalism: The Limits of Welfare State Development in the Progressive Era*, JOURNAL OF POLITICAL HISTORY 1, 3 (1989): 261–91.

36 UNITED STATES LIBRARY OF CONGRESS. <http://memory.loc.gov/learn/features/timeline/depwwii/newdeal/newdeal.html>.





**Figure 1: The “Three Pillars” of the European Union**

Source: <http://www.diplomatie.gouv.fr/en/IMG/gif/cfsp-2.gif>

language and form enter the national legislation of the member states automatically. Directives, on the other hand, are less specific and are meant to be implemented into member state legal orders by means adopted by the states themselves. Directives are therefore binding as to the *result* to be achieved. Other forms of legislation exist, such as: decisions (binding and directed only to individual entities); communications (often outlining new policy initiatives); resolutions (declaratory and non-binding); and recommendations.

Between 1985 and the early 1990s the EC enacted eighty directives and fifteen hundred regulations;<sup>37</sup> but the EC is not operating without oversight. Appropriate provisions ensure that the Council (i.e., the member states), and most recently the European Parliament, have ways of monitoring the implementation of laws by the EC. It is done by what are called comitology committees.<sup>38</sup> There are three such committees: advisory, management and regulatory. They consist of Council appointed officials who sit in on the Commission's proceedings. Each committee has a mechanism, by a vote or other means (such as a referral to the Council), allowing it to effectively control the Commission's actions.

## **General Decision Making Process**

The Council of Ministers is the most important legislating body in the EU. It comprises all ministers of national ministries that deal with a proposed law. The council meets in nine functional configurations, consisting of ministers responsible for a particular policy area.<sup>39</sup> The European Council, which is the summit of the heads of EU member states, sets the long-term agenda for the EU. It is chaired by the country which happens to hold the 6-month rotating Presidency of the European Union and meets around four times a year.<sup>40</sup> The President represents the EU at the meetings of other international organizations unless the EU has specific external competence, whereby it sends its special representative from the EC.<sup>41</sup> The EC drafts primary and secondary (implementing) legislation based on the recommendations of the European Council, and the Council(s) of Ministers, respectively. The EC's legislation drafts are submitted to the Council of Ministers and the EP for elaboration, amendments and a vote.

Since the 1986 Single European Act, most of the laws passed in the Council use a supermajority voting system (qualified majority—QM),<sup>42</sup> which

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37 G MAJONE, ED., *REGULATING EUROPE*, Routledge: 1996.

38 For an in depth definition see the EUROPA GLOSSARY [http://europa.eu/scadplus/glossary/comitology\\_en.htm](http://europa.eu/scadplus/glossary/comitology_en.htm).

39 COUNCIL CONFIGURATIONS, The Council of the European Union Website, <http://www.consilium.europa.eu/showPage.asp?id=427&lang=en&mode=g>.

40 From 2007 onwards the Presidency will be "tripled," with three countries taking the chair for 1.5 year. Within that period, each country will play a leading role for 6 months on the rotation basis. The person holding the presidency chair is usually the foreign minister.

41 The World Trade Organization (WTO) is a good example of where the EU has exclusive competence. At the WTO all member states of the EU are represented by the Commissioner for Trade.

42 A qualified majority (QM) is the number of votes required in the Council for a decision to be adopted when issues are being debated on the basis of Article 205(2) of the EC Treaty. After 1 January 2007, following enlargement of the Union, the QM went up to 255 votes out of a total of 345, representing a majority of the Member States. Moreover, a Member

deprives a member state of the veto power usually granted in most treaty-based international organizations. Yet, most legislation is in fact secondary and made by the EC, to which the Council has effectively delegated all implementing powers. The EP always participates, but the mode of its participation depends on the policy area. The EP is involved in amending EC's drafts; and towards the end in reconciling its differences with the Council. Most legislation passed under the QM in the Council employs the so-called co-decision procedure,<sup>43</sup> with the EP retaining a veto power in the EP-Council reconciliation committee (Figure 2). Yet, the EP – the only popularly elected European institution – has limited powers, a fact which fuels the so-called “democratic deficit” debate in the EU. While often an equal partner with the Council in promulgating legislation through the co-decision procedure, the EP is not a traditional parliament. It does not possess the right of legislative initiative (which belongs to the EC). It is rather a scrutinizing body, amending legislation proposed by the EC. The EP is also involved in scrutinizing the initiatives of the Commission DGs responsible for social policy through various committees.<sup>44</sup> The committees also prepare amendments to EC proposals when the procedures governing a given policy area allow for it. In a most recent development, the EP received a right to participate in comitology. It can now block a quasi-legislative initiative of the Commission under the co-decision procedure by an absolute majority vote.<sup>45</sup>

The EP also likes to issue many non-binding resolutions, also called “own initiative reports,”<sup>46</sup> that have strong symbolic power and are used

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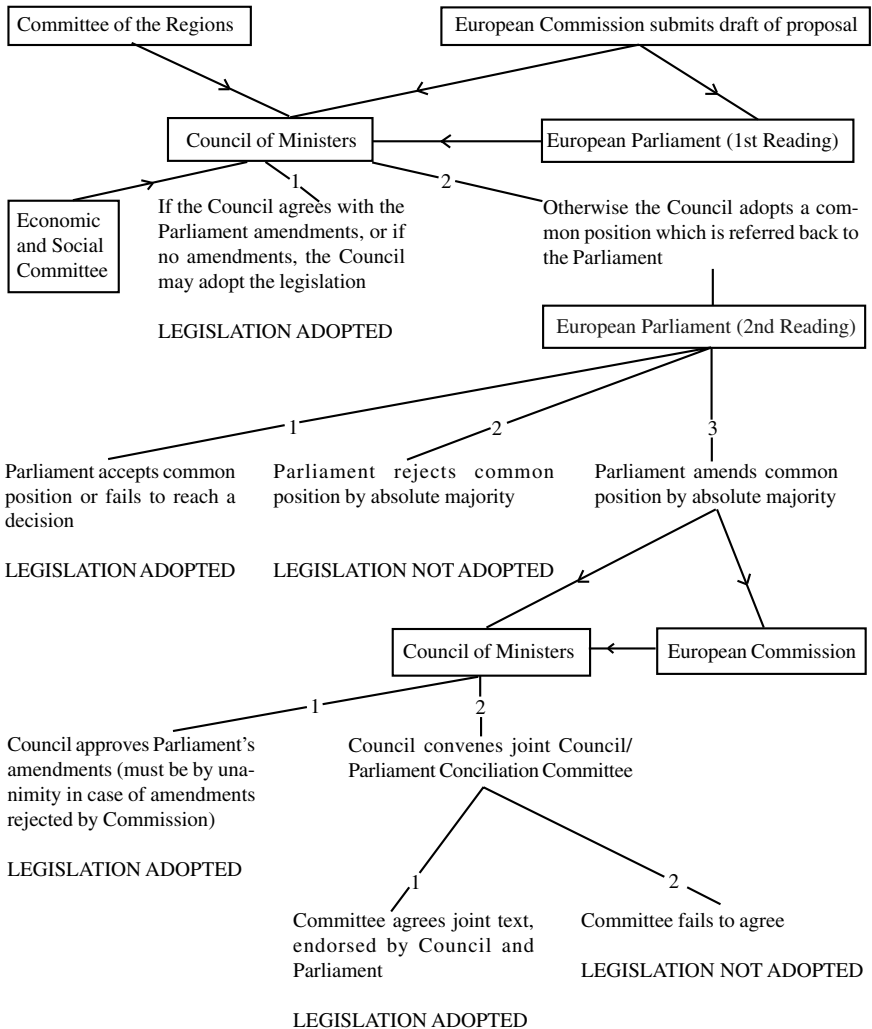
State may request verification that the QM represents at least 62% of the total population of the Union. If this is not the case, the decision is not adopted. EUROPA GLOSSARY, [http://europa.eu/scadplus/glossary/qualified\\_majority\\_en.htm](http://europa.eu/scadplus/glossary/qualified_majority_en.htm).

43 “Codecision gives the same weight to the European Parliament and the Council of the European Union on a wide range of areas (for example: transport, the environment and consumer protection). Two thirds of European laws are adopted jointly by the European Parliament and the Council.” See the European Parliament website: <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=46&pageRank=3&language=EN>.

44 Civil Liberties, Justice and Home Affairs (LIBE); Human Rights (DROI); Women's Rights and Gender Equality (FEMM); Culture and Education (CULT); and Development (DEVE). Other committees – such as the committee on employment (EMPL), and especially the committee on environment, public health and food safety (ENVI) – often encounter issues connected to moral regulation.

45 Report on the conclusion of an interinstitutional agreement, taking the form of a joint statement, concerning the draft for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (new regulatory procedure with scrutiny) 10126/1/2006 – C6-0208/2006 – 2006/2152(ACI)), A6-0237/2006.

46 Rules of Procedure of the European Parliament, under the sub-heading: “Governing Bodies,” <http://europa.eu/scadplus/leg/en/lvb/o10000.htm>.



**Figure 2: Co-decision Procedure**

Source: <http://www.eurim.org/EURGUIDE.html#sources>

to legitimize policy actions of the EC (Appendix A). They have no legal binding power, yet they are often mentioned in the recitals of directives and regulations. Increasingly, the EP has been very active in issuing opinions in the area of human rights and civil liberties.

The European Court of Justice (ECJ) plays a very prominent policy-making role in the EU system. Consisting of 27 judges (one from each member state, chosen for a six-year term), the ECJ is effectively charged with

a judicial review of community legislation. In general, the legislation has to further the four foundational freedoms of the EU: freedom of movement for goods, capital, workers and services. The ECJ has interpreted the TEC as a *sui generis* constitution that confers positive obligations on the member states, as well as gives rights to individuals to claim these obligations.

In a groundbreaking case *Van Gend en Loos*, often compared to *Marbury v Madison* which established the principle of judicial review by the Courts concerning the constitutionality of legislative enactments, the ECJ has unequivocally stated that the TEC has established a new order of law that has direct effect in the member states. In other words, states could not any more promulgate legislation that went against the letter of the treaty. There was a clear statement in the court decision to the effect that the member states have relinquished part of their sovereignty and thus effectively enabled the treaty to impose rights and duties not only on the member states but also on individuals. Other doctrines, usually associated with constitutional orders, such as supremacy and preemption have been similarly construed by the rulings of the ECJ. Thus by 1964 the EU had established a rather powerful constitutional order. Finally, the Amsterdam Treaty has also given the ECJ the power to ensure respect of the fundamental rights and freedoms by the European institutions.<sup>47</sup>

As for the ECJ caseload, in the area of social policy it was around 23 percent by 1998. Only competition cases arise more frequently, and the rate of growth for social policy cases is much greater.<sup>48</sup> The ECJ has also issued many rulings that expanded its jurisdiction in the area of fundamental human rights, which will be discussed in the second chapter of this paper.

## Drafting Legislation through “Civil Dialogue”

The Directorates General (DGs) of the European Commission (EC) that deal with the drafting and implementation of policy instruments are divided into two groups. The ones dealing with the internal affairs of the member states we will call policy directorates. The other group of directorates deals with external affairs of the EU. The matters of moral regulation can be present in many more departments (e.g. research), and any attempt to confine them neatly into restricted areas of bureaucratic expertise is doomed to failure. The number of treaty articles with specific competencies and decision making rules have grown from 86 (TEC, 1957) to 254 (Nice Treaty, 2000).<sup>49</sup> These are spread across many fields and the analyst is simply forced to prioritize.

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47 Article 46, TEU, see Note 33 *supra*.

48 P. Pierson, “Social Policy and European Integration” in A. MORAVCSIK ED. CEN-TRALIZATION AND FRAGMENTATION, Council on Foreign Relations, 1998.

49 Guillaume Durand, Ed., *After the Annus Horribilis : A Review of the EU Institutions*, THE EUROPEAN POLICY CENTER, WORKING PAPER No. 22, January 2006.

Interestingly, realizing this increased number of competencies, the EC has divided itself into five functional groups of commissioners; the Fundamental Rights, Anti-Discrimination and Equal Opportunities Group deals with issues of moral regulation. The existence of these functional groups shows the increasing salience of moral regulatory matters, which is also borne out in interviews with EC officials.<sup>50</sup>

One of the most dynamically developing modes of making policy by the EC is “civil dialogue.”<sup>51</sup> More and more frequently, before the process of issuing the directives and regulations takes place, the EC carries out a consultative process with civil society. The beginning of “civil dialogue,” which in EU parlance means making policy together with NGOs, has its roots in the 1992 Maastricht Treaty, and the Commission 1993 Green Paper on social policy.<sup>52</sup> It gained real impetus during the Second European Social Policy Forum convened in 1998,<sup>53</sup> which aimed at broadening NGO access to the EU. Usually, the EC issues a Green Paper outlining ideas for legislation and submits it for discussion to all political bodies of the EU, as well as civil society through the internet. On the basis of these recommendations the EC issues a formal White Paper, which then presents the official position of the EC on a legislative matter. The White Paper is discussed and the relevant legislative proposals follow suit. It is a rather expansive version of the “notice and comment” procedure of American regulatory agencies involved in consulting society before issuing regulations. In fact, the EU sponsors NGOs and establishes them as the main implementing partners in some areas of policy.

## **Implementing Legislation through “Community Action Programs”**

The EC is tasked with not only proposing, but also with implementing EU law. It does so by spending the EU budget appropriated for each DG (Appendix B). The EU operates on a 7 year budget agreed to by all EU institutions. It amounts to between two and four percent of community

50 Interviews with Sergiusz Waplak and Deirdre Hodson, Anti-Discrimination Unit within the DG on Employment, Social Affairs and Equal Opportunities, November 15, 2006.

51 “Civil dialogue” is a term used to denote consulting civil society. [http://europa.eu/abc/eurojargon/index\\_en.htm](http://europa.eu/abc/eurojargon/index_en.htm).

52 M. CARLEY, ED., EUROPEAN SOCIAL POLICY FORUM, Brussels, DGV, Dublin, European Foundation for the Improvement of Living and Working Conditions, 1998; quoted in Bouget and Prouteau, *National and Supranational Government\_NGO Relations: Anti-Discrimination Policy Formation in the European Union*, PUBLIC ADMINISTRATION AND DEVELOPMENT 22, 31-37 (2002): 33.

53 EUROPEAN SOCIAL POLICY FORUM, SUMMARY REPORT, Brussels, 24-26 June 1998. [http://www.disabilitaincificre.it/allegati/European\\_Soci\\_Pol\\_forum.pdf](http://www.disabilitaincificre.it/allegati/European_Soci_Pol_forum.pdf).

member states' total budgets and 1.01 percent of the EU's total GNP.<sup>54</sup> The total EU budget amounts to roughly €12 billion. The revenue is taken from a common EU external tariff, agricultural levies, percentage of national VAT (Value Added Tax) revenues, and some direct contributions from member state budgets. The EU possesses no direct fiscal authority, although issues of fiscal harmonization, especially in the realm of corporate taxes, have emerged in consideration of future directives and regulations. Almost half of the budget is spent on farm subsidies, and a third on economic aid to poor regions. The rest of the budget is used on external policies of the EU (7%), administrative expenses (6%), citizenship, freedom, security and justice (1%).<sup>55</sup>

The EC is instructed in Article 274 (TEC) to implement the budget on the basis of regulations issued by the Council as laid out in Article 279. The EP, acting on the recommendation of the Council, grants discharge to the EC to implement the budget (Art. 276). The so-called Financial Regulations issued by the Council govern the EC's administration of the budget. The general budget of the European Communities prescribes three modes of budget implementation: 1) on a centralized basis; 2) by shared or decentralized management; or 3) by joint management with international organizations.<sup>56</sup> The first and second modes are relatively uncontroversial and account for the majority of managed funds. Under them money is spent either by: the EC's relevant DG itself; a member state (shared); or a third country (decentralized). In the third, "joint management" mode, civil society organizations (NGOs) are the main beneficiaries.

One of the popular ways of implementing the budget are the so-called "community programs."<sup>57</sup> Currently, the EC operates around 46 programs operated by around 12 DGs. Not all DGs operate "community programs." All of the social policy DGs which concern this analysis possess community programs, which are established by the decisions of the Council and financed from the general EU budget. Often these community programs are implemented in the joint management mode as they utilize various NGOs to help

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54 FINANCIAL PROGRAMMING AND BUDGET, The European Commission website. [http://ec.europa.eu/budget/index\\_en.htm](http://ec.europa.eu/budget/index_en.htm).

55 *Id.*

56 Article 54 of the Council Regulation No 1605/2002 of 25 June 2002.

57 Community Programs are based on extensive European cooperation, representing and supporting the integration of community policies, with the implementation of multi-annual projects via international consortiums. Community Programs are a series of integrated measures accepted by the European Commission, with the primary objective of strengthening the cooperation among the Member States regarding Community policies for a long period of time. Community Programs are financed from the general budget of the Community. See example at: [www.eucenter.org/download/other/currcommprg.pdf](http://www.eucenter.org/download/other/currcommprg.pdf).

them implement programs (see Chapter 3). Prior to the adoption of the EU's Financial Regulations in 2002, many grants were given out to various NGO's without an explicit treaty basis under the administrative section of the EU budget.<sup>58</sup> This basis was often provided by Article 308 TEC, which just like the *necessary and proper clause* in the US Constitution enables legislation in fields where the EU does not possess explicit powers.<sup>59</sup>

The following sections examine the way the general legal and policy framework outlined thus far allows for a large scope of material action in areas that may concern social conservatives.

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58 For a list of some grants given out under the A-30 administrative heading see House of Commons Written Answers for Sept 8 2004: <http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040908/text/40908w08.htm>.

It is important to notice that the nomenclature of the budget headings has changed after the new Financial Regulation of 2002 came into force: Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

59 Article 308 TEC: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures." See Note 33 *supra*.



## EU POSITIONS ON HUMAN RIGHTS AND RELIGION

All of the 27 members of the EU are signatories of the European Convention on Human Rights (ECHR) of 1950,<sup>60</sup> which together with the European Court of Human Rights (ECourtHR) in Strasbourg<sup>61</sup> has for almost half a century served as the guarantor of human rights in Europe. The EU as an economic organization promoting the four freedoms of movement has, for most of its existence, agreed that human rights concerns should be resolved within the member states' own constitutional and ECHR treaty obligations.

The tradition of limiting itself to economic matters began to change in the 1980s when the EU acquired more power and ambition to act as a quasi-government, thus potentially infringing upon the individual human rights guaranteed under the ECHR and the national constitutions. The premise that national courts, or the Strasbourg court, could claim supremacy over the EU by adjudicating conflicts between fundamental rights and the EU's four freedoms quarrels with the EU's expansive view of its prerogatives.<sup>62</sup> On the other hand, some observers in the European member states are afraid that the EU can escape human rights violations because its legal acts escape the control of the ECourtHR, which occupies itself only with the human rights record of the European states, not other European organizations such as the EU.<sup>63</sup>

### Making New Rights

In response to criticism that it is unaccountable for human rights violations, the EU has responded thusly. Instead of responding to the complaint that is unanswerable to the ECourtHR by acceding to the ECHR, it has chosen to write its own human rights agenda, often changing the language contained in the ECHR. By doing so, it has played into the hands of the critics that see increased EU activity in the area of human rights as a means to extending its prerogatives. Below is the outline of the EU's procedures established to defend fundamental rights:

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60 THE EUROPEAN CONVENTION OF HUMAN RIGHTS (ECHR) 1950. <http://www.hri.org/docs/ECHR50.html>.

61 THE EUROPEAN COURT OF HUMAN RIGHTS (ECourtHR). <http://www.echr.coe.int/ECHR/>.

62 Indeed, the German Constitutional Tribunal ruled in its *Solange I* decision from 1974 that it retains its power to control the EU acts in so far as they potentially violate constitutional rights guaranteed by the German constitution.

63 For a very good discussion of the conflict see Laurent Scheek, *Solving Europe's Binary Human Rights Puzzle: The Interaction between Supranational Courts as a Parameter for European Governance*, QUESTION DE RECHERCHE, No. 15 – October 2005, 40.

- It established, as a general principle, that the EU is founded on “the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law” upon which the Union is founded (Art. 6 (1) TEU).<sup>64</sup>
- Art. 6 (2) TEU states that the EU will respect the ECHR and the constitutional traditions of the member states.<sup>65</sup>
- The Union can suspend certain rights of the member state deriving from the application of the Treaty, if it has determined the existence of a serious and persistent breach of the principles by that member state (Art. 7 TEU).<sup>66</sup>
- Candidate countries will have to respect these principles to join the Union (Art. 49 TEU).<sup>67</sup>
- It has also given the ECJ the power to ensure respect of the fundamental rights and freedoms by the European institutions (Art. 46 TEU).<sup>68</sup>
- In the TEC it has mentioned the observance of the 1961 European Charter of the Social Rights of Workers in Art. 136 as well as the ECHR.<sup>69</sup>
- Also within the TEU, Title V Article 11 states that in developing its common EU foreign policy its objective will be to “develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.”<sup>70</sup>

The European Court of Justice is the primary EU institution vested with interpreting EU law. As early as 1974, the ECJ ruled that fundamental rights belonged to the general principles it had to defend.<sup>71</sup> What is more, although the Amsterdam Treaty provided the first mention of ECJ’s jurisdiction over actions of the EU institutions in Article 6 TEU, the ECJ had already developed case law that expanded that jurisdiction to cover the action of member states while implementing EU law and interpreting derogatory clauses from EU law.<sup>72</sup> Finally, in *Schmidberger*<sup>73</sup> the ECJ ruled that it can invoke fundamental rights in any conflict between a member state and EU law.

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64 Note 33 *supra*.

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 Case C-9/74, *Casagrande* [1974] ECR 773.

72 Case C-5/88, *Wochauf v. Germany* [1989] ECR I-2609 and Case C-260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotili Etairia Pliforsis i Sotirios Kouvelas* [1991] I-2925.

73 Case C-112/00, *Eugen Schmidberger v. Austria* [2003] ECR I-5659.

Matters involving "moral regulation" are usually those that deal with the principle of non-discrimination, gender equality and the common market (especially the freedom of movement of persons and services). In the sphere of gender equality in the *Kalanke*<sup>74</sup> case and then in *Marschall*<sup>75</sup> the ECJ ruled in favor of allowing members states to take measures favoring under-represented sex in employment and with regards to gender based disadvantages in pursuing careers. The decisions however outlawed explicit quotas. In a series of cases<sup>76</sup> the ECJ extended the concept of gender equality to transsexuals. As for abortion, the ECJ carefully avoided the issue. In *Grogan*,<sup>77</sup> the ECJ responded favorably to the question of the Irish court whether to grant injunction on behalf of the Society for the Protection of Unborn Children to stop a group of youth distributing leaflets in Ireland about the availability of abortion abroad. The court argued that although abortion might be considered a service within the meaning of the TEC, and thus prohibiting the distribution might be construed as a limitation on the freedom of movement, it nevertheless stated that for a restriction on freedom of movement to exist there should be "an economic nexus between ... [the information provider] and an abortion provider ..." <sup>78</sup> Since there was no nexus, Ireland was justified in banning the activity. Nevertheless, the case sent a clear signal that the ECJ is willing to enforce common market laws that potentially conflict with substantive human rights arising from constitutional commitments of the member states.<sup>79</sup>

Marriage still seems to be protected by national laws. In *Grant*<sup>80</sup> the ECJ stated that "in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages." Yet a few years later in *K.B.*<sup>81</sup> the ECJ came close to interfering with British marriage law when it pointed to the ECtHR ruling in *Goodwin*,<sup>82</sup> which extended the right to marry to transsexuals.

74 Case C-450/93, *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3069.

75 Case C-409/95, *Marschall v. Land Nordrhein-Westfalen* [1997] ECR I-6363.

76 Case C-423/04, *Sarah Margaret Richards v. Secretary of State for Work and Pensions* [2006] ECR I-03585.

Case C-13/94 *P. v. S. and Cornwall County Council* [1996] ECR I-02143.

77 Case C-159/90, *Society for the Protection of Unborn Children v. S. Grogan*

78 Alicia Czerwinski, "Sex, Politics, and Religion: The Clash Between Poland and the European Union over Abortion," *DENVER JOURNAL OF INT. LAW & POLICY* 32 (653), Fall 2004, p. 664.

79 Diarmuid Rossa Phelan, *Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union*, *THE MODERN LAW REVIEW* 55 (5), 1992, pp. 67-689.

80 Note 87 *infra*.

81 Case C-117/01, *K.B. v. National Health Service Pension Agency* [2004] ECR I-541.

82 Note 88 *infra*.

Another example of the EU crafting “moral regulation” that potentially differs from the ECHR or national constitutional traditions is the expansive nature of Article 13 TEC, which for the first time in the history of international law enshrined the principle of anti-discrimination on the basis of sexual orientation. In fact, the inclusion of sexual orientation in the Article, and then in the implementing directives, has caused some new member states’ parliaments to protest.<sup>83</sup> The EU seems to have followed a course set by the civil rights rulings of the American Supreme Court occasioned initially by the famous Footnote number 4 to the *Carolene Products Company* case,<sup>84</sup> often criticized for judicially creating groups worthy of special legal protection.

Finally, the Fundamental Charter of Human Rights of the EU is an attempt to codify this treaty language and jurisprudence and enshrine them as “fundamental rights.”

### **The EU Charter of Fundamental Rights: Moving Away from the Human Rights Consensus**

In 2000 the EU promulgated its own Charter of Fundamental Rights of the European Union that was intended to codify all the rights that the EU feels itself obliged by. The EU took this opportunity to change the language of some of the ECHR provisions, thus helping the activist rulings of the ECtHR. The most glaring is Article 9 of the Charter on the right to marry, which changes the original language of Article 12 of the Convention:

Article 12 of the Convention states:

Men and women of marriageable age have the right to marry and to found a family, according to national laws governing the exercise of this right.<sup>85</sup>

Article 9 of the Charter states:

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.<sup>86</sup>

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83 Filip van Laenen, *Latvia Angers EU over “homophobia,”* THE BRUSSELS JOURNAL, Sun, 25 June 2006.

84 Though *Carolene Products* was not itself a civil rights case, the footnote has been the basis for the Supreme Court’s “subsequent judgments in cases protecting the integrity of the political process or involving so-called ‘suspect’ classifications, such as race, creed, alienage, religion and gender.” U.S. Department of State, <http://usinfo.state.gov/usa/infousa/facts/democrac/34.htm>.

85 THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1950 (ECHR) (emphasis added). <http://www.hri.org/docs/ECHR50.html>.

86 CHARTER OF THE FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION. [http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm).

What is more, while formally a non-justiciable document given its status as an annex to the TEC, the Charter is being quoted by ECourtHR, and Article 9 is not an exception. A legal scholar notes that “while in *Grant*<sup>87</sup> the Court of Justice [ECJ] noted that the ECourtHR had interpreted article 12 of the ECHR, on the right to marry, as applying only to ‘traditional marriage between two persons of opposite biological sex, since this judgment... the ECourtHR has moved beyond such a conception and in the *Goodwin*<sup>88</sup> case extended the right to marry to transgendered people. The ECourtHR stated that there have been ‘major changes in the institution of marriage’ since the adoption of the European Convention. In this regard, the ECourtHR noted that article 9 of the EU’s Charter of Fundamental Rights departs from the wording of article 12 of the European Convention ‘no doubt deliberately’ by removing the reference to only ‘men and women’ having the right to marry.”<sup>89</sup>

The “updates” to the ECHR are also present in the section of the Charter under the heading of “equality.” The Charter elevates certain EU policies to the level of fundamental rights. Article 13 TEC on anti-discrimination is included as Article 21 changing significantly the non-discrimination Article 14 of the ECHR. First, it includes sexual orientation as a prohibited ground, and secondly unlike Article 14 ECHR it prohibits discrimination in all EU law. It is worth remembering that Article 14 ECHR prohibits discrimination only within the scope of exercising rights *explicitly mentioned* in the ECHR, not in general (i.e. within the constitutional orders of the signatory states). By way of illustration, that is why the United Kingdom can discriminate against Catholics by not allowing them to inherit the British throne. There is no right to become a king in the ECHR. The EU Charter changes all this, and the application of Article 21 extends to all present and future activities of the EU.

Of significance is the fact that when the Council of Europe introduced a special protocol (Protocol 12), which extends the application of Article 14 to all rights exercised within the member states, only ten states signed on to it by 2006.<sup>90</sup> Clearly, most member states are reluctant to extend broad anti-discrimination provisions, not to mention transferring the jurisdiction in those matters to international bodies. Yet, all member states that will ratify the EU Reform Treaty, which makes the Charter its integral part, will find

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87 Case C-249/96 *Grant v South West Trains* [1998] ECR I-621.

88 *Goodwin v United Kingdom* (No 28957/95) and *I v UK* (Application no 25680/94), (2002) 35 EHRR 18.

89 Claire McGlynn, *Families, Partnerships and Law Reform in the European Union: Balancing Disciplinary and Liberalisation*, THE MODERN LAW REVIEW, 69 (1), 2006, 102.

90 “The Council of Europe protocol against discrimination is important.” VIEWPOINT. Available at the Commissioner’s website at [www.commissioner.coe.int](http://www.commissioner.coe.int).

themselves with a much more broad anti-discrimination provision than under the ECHR and with a much more powerful court to enforce it. Another policy provision that is raised to the status of a fundamental right is Article 141 TEC on gender equality in Article 23. It actually goes further than Article 141 TEC in that it does not mention the role of the member states in ensuring advantages to the underrepresented sex, simply stating that such action is permissible in general.

This much is clear: the EU seems to be fashioning the human rights regime after its own needs and internal agendas, of which the re-definition of marriage is only one example. What is more, in an illuminating article about the relations between the ECHR and the ECJ, Laurent Scheeck<sup>91</sup> points out that the initial period of hostility between the two courts has been replaced by a mutual endeavor. If this endeavor includes cross-citation of case law to promote the political agenda of both European courts, as in the *Goodwin*<sup>92</sup> case, then it appears that the initial intention of controlling the EU by an external human rights body has been replaced by a joint project: using human rights language as a political instrument in imposing controversial moral rulings on the member states.

## Monitoring and Promoting the EU Human Rights Regime

There exist around twenty quasi-regulatory agencies of the EU such as the recently instituted Agency on Fundamental Rights, the European Observatory on Demography and the Social Situation (renamed from the European Observatory on the Social Situation, Demography and Family), and the soon to be operational European Institute on Gender Equality, that serve as research and monitoring arms of the various EC directorates. In that group are also included various “expert committees” created through a public tender offer, or open bid, by the EC, specifically the Expert Network on Fundamental Rights.

The DG EMPL (Employment, Social Affairs and Equal Opportunity), within the mandate given to it by the Open Method of Coordination (OMC) agreement at Lisbon, manages its multilateral surveillance activities in the realm of the family through the European Observatory on Demography and the Social Situation in Vienna, Austria. It has organized various conferences: the 2000 Seville conference on fertility, the 2001 Milan conference on family forms and the young generation, the 2002 conference on immigration and family, the 2003 conference the family in the health system and finally the 2004 conference Europe’s Coming Generation: demographic trends and social change.

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91 LAURENT SCHEEK, Note 63 *supra*.

92 Note 88 *supra*.

The Agency for Fundamental Rights serves as an instrument of the EC to monitor and enforce the human rights framework in the EU.<sup>93</sup> Its purposes are myriad, though the agency avers that “These tasks do not belong to the Fundamental Rights Agency:

- a. examination of individual complaints;
- b. regulatory decision making powers;
- c. monitoring the situation of Fundamental Rights in the Member States for the purposes of Article 7 of the Treaty of the EU;
- d. dealing with the legality of the legislative acts within the meaning of Article 230 of the Treaty (which refers to the Court of Justice’s power to review the legality of Community acts), or questioning whether a Member State has failed to fulfill an obligation under the Treaty within the meaning of Article 226.”<sup>94</sup>

On the other hand “the network of independent experts could be one of the information networks animated by the Agency.”<sup>95</sup> The activity of this “network” is a cause of concern. Pro-abortion groups were invited (to the exclusion of pro-life organizations) in November 2005 to advise the Network of Fundamental Human Rights Experts on the situation of “reproductive rights,” with the focus on new member states. Their advice resulted in a 40-page document squarely condemning Slovakia, among other countries, for allowing an exception from performing abortions for Catholic doctors in its treaty with the Vatican. One of the Network’s experts from Italy protested the decision, not least because pro-life groups were not consulted. The network has issued many controversial reports in which it called for the legalization of same-sex partnerships and unequivocally praised countries that instituted same-sex marriage.<sup>96</sup> Given that the new agency will rely on

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93 FREEDOM, SECURITY AND JUSTICE, European Commission website [http://ec.europa.eu/justice\\_home/fsj/rights/fsj\\_rights\\_agency\\_en.htm](http://ec.europa.eu/justice_home/fsj/rights/fsj_rights_agency_en.htm).

94 *Id.* (emphasis in original).

95 *Id.*

96 Report on the Situation of Fundamental Rights in the European Union and its Member States in 2005. (available at <http://crldho.cpdr.ucl.ac.be/documents/Download.Rep/Reports2005/CFR-CDFExecSumm2006EN.pdf>) “Welcoming the extension of the marriage to same-sex persons in Spain, following the examples of the Netherlands and Belgium, the Network notes that several Member States still have not organized, in the framework of an institution such as registered partnerships, the legal consequences of the cohabitation of same-sex couples. Having regard to the case law of the Human Rights Committee instituted within the framework of the International Covenant on Civil and Political Rights, the independent experts underline the risk of discrimination enshrined by such a situation. Agreeing with the concerns expressed by the European Parliament, the Network draws the attention on the reemergence of homophobia in certain Member States, which has also seriously harmed the freedom of peaceful demonstration.”

“civil society dialogue” through its nascent “fundamental rights platform,” and other pre-existing networks<sup>97</sup> one can expect similar pronouncements from the agency.<sup>98</sup>

In an innovative move at the 2001 Lisbon Summit, the EU committed itself to a new method of coordinating policies among members of the EU without explicit recourse to law making. The Open Method of Coordination<sup>99</sup> (OMC) gives authority to the EC for the purpose of coordinating research on various moral regulation provisions. The EU can develop guidelines for action and can mandate reports from the member states on the state of reform. The EU can also issue performance benchmarks again, with appropriate powers of surveillance via means of progress reports. The OMC is most important for the purpose of research into the EU social policy making process, as it is designed specifically to reconcile intractable differences among differing models of social provision in the member states of the EU. It is significant that social policy is added on to employment objectives. Gender equity issues – and thus indirectly family issues – are also dealt with inside the employment and social affairs directorate.

Almost all examples of OMC illustrate the adoption of degrees of the centralization approach, and few seem to illustrate a tendency towards the deepening of cultural uniqueness or movement away from central command. As Noemi Lendvai of the University of Bristol observes: “Social policy is not a national business any more... The construction of social inclusion through the Open Method of Coordination... is a discursive regulatory mechanism towards a reconstitution of the European ‘social.’”<sup>100</sup>

## **Ensuring the Ambiguous Status of Religion**

The manner in which state authorities tackle religious issues is regulated by member state constitutions, but also by the provisions of the ECHR, especially Article 9 on freedom of conscience and religion. The EU treaties

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97 COUNCIL REGULATION (EC) No 168/2007 of 15 February 2007, see Articles 6 (1a) and 10 (1).

98 Indeed, the meeting of FRA with a selected group of NGOs did not fail “to address threats to human rights in the EU, including concerning sexual and reproductive rights.” (See Main Conclusions of the Round Table Discussion 5 June 2007 – European NGO Platforms and the European Union Fundamental Rights Agency (FRA), also available at [http://fra.europa.eu/fra/material/pub/civil/report\\_05062007\\_en.pdf](http://fra.europa.eu/fra/material/pub/civil/report_05062007_en.pdf))

99 See EUROPA Glossary on the European Union website: [http://europa.eu/scadplus/glossary/open\\_method\\_coordination\\_en.htm](http://europa.eu/scadplus/glossary/open_method_coordination_en.htm).

100 Noemi Lendvai, “The Indigenization of social inclusion policy in post-communist Europe and its implication for EU social policy after enlargement,” paper delivered at ESPAnet conference 2004, Oxford, 1. <http://209.85.165.104/search?q=cache:JKtsGXPYyIAJ:www.apsoc.ox.ac.uk/Espanet/espanetconference/papers/ppr.2A.NL.pdf+espanet+conference+LENDVAI+OR+NOEMI+%22oxford+2004%22&hl=en&ct=clnk&cd=1&gl=us>.



do not refer to religion or churches with the exception of Article 13, which prohibits discrimination based on religion. In 1997 the Commission of the Bishops' Conferences, representatives of the Vatican, national conferences of bishops, the European Ecumenical Commissions for Church and Society, and the Orthodox tradition and German Protestant churches issued a joint declaration that was then presented by German Chancellor Helmut Kohl at the 1997 EU Intergovernmental Conference preparing the Amsterdam Treaty. Declaration No. 11 annexed to the Treaty of Amsterdam states:

The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations.<sup>101</sup>

Originally proposed as a part of the TEU, it failed in the Intergovernmental Conference and remained as a non-binding declaration.<sup>102</sup> It is, then, very difficult for the Churches in Europe to claim special ethical status. Indeed, during the deliberation of the Constitutional Convention working on the now failed constitutional treaty of the EU, there arose a concern as to the mention of even God or religion in the preamble. In the end, there was no mention of either. The Reflection Group, organized by the European Commission, initiated by the President of the European Commission, Romano Prodi, and chaired by Kurt Biedenkopf, former Prime Minister of Saxony and a professor of law in Germany, met during 2003, to consider the "The Spiritual and Cultural Dimension of Europe."<sup>103</sup>

The issue under discussion – relationship of church and state – essentially bogged down and came to a no consensus conclusion. Despite a consensus on the secular nature of government, there was an inability to form a consensus on the place of religion in Europe, other than an acknowledgement of the religious heritage of Europe (as past history). On the other hand the Convention acknowledged the special status of churches in Europe by making Declaration No. 11 an integral part of the proposed treaty. That move enraged the opponents of recognizing special status for churches, such as the Catholics For a Free Choice.<sup>104</sup> As for the reference to God in the preamble

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101 Declaration on the status of churches and non-confessional organizations of 10 November 1997, 1997 O.J. (C 340) 133.

102 Thomas Jansen, *Europe and Religions: The Dialogue Between the European Community and Churches or Religious Communities*, SOCIAL COMPASS 47(1), 2000: 108.

103 Biedenkopf, K., Geremek, B. and Michalski, K. (2004) *The Spiritual and Cultural Dimension of Europe: Concluding Remarks*, INSTITUTE FOR HUMAN SCIENCES, Vienna/Brussels 2004. Available at: <http://www.iwm.at/publ/rep-fin.pdf>.

104 Catholics For a Free Choice website <http://www.cath4choice.org/news/pr/2005/20051128eudialogue.asp>.

of the TEU, a different amendment tabled by the European People's Party and calling for the reference to Judeo-Christian values failed to be included in the EP resolution on the treaty.<sup>105</sup> The proposed Reform Treaty incorporates the declaration but puts other philosophical and non-confessional organizations on the same footing. Nor does it include any reference to Christianity or God. Nevertheless, the EC does maintain contacts with major religions. These relations developed under the influence of EC presidents Delors and Santer (both Christian Democrats, politically).<sup>106</sup> In 1992 Jacques Delors launched a special project called "the Soul for Europe,"<sup>107</sup> an association of major monotheistic faiths along with European humanists, for the explicit purpose of debating the spiritual dimension of European integration. The Forward Studies Unit within the EC has been charged with the mission to carry out dialogue with churches and humanist organizations.<sup>108</sup> There are also organizations representing national churches and religious orders.<sup>109</sup> The unit has been in touch with nearly eighteen representatives reflecting all major and a few minor Christian churches including the Roman Catholic Commission of the Bishops' Conferences of the Member States of the European Community (COMECE), European Evangelical Alliance, Bureau de l'Eglise orthodoxe aupres de l'UE, European Network of Pentecostal Churches and many others including Buddhist and Jewish organizations. There are also organizations representing national churches and religious orders.<sup>110</sup> Most recently, on 30 May 2007, 15 leaders of monotheistic religions met at a conference organized by the EU Bureau of Policy Advisers, which for the

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105 Resolution on the draft Treaty establishing a Constitution for Europe and the European Parliament's opinion on the convening of the Intergovernmental Conference (IGC) (A5-0299/2003).

106 Note 102 *supra*, 104.

107 Berliner Konferenz für europäische Kulturpolitik [http://www.kulturstiftung-des-bundes.de/media\\_archive/1090914768590.pdf](http://www.kulturstiftung-des-bundes.de/media_archive/1090914768590.pdf).

108 Note 102 *supra*, 105: One of the tasks of the unit was "to advise on implementation of the program *A Soul for Europe: Ethics and Spirituality*. This is an initiative that enables the Commission in agreement with the European Parliament, to give financial support to projects with a religious or ethical inspiration. Such projects must have a spiritual, ethical and European dimension and also: help to interpret and give meaning to the process of European unification; promote tolerance and pluralism and emphasize mutual respect and acceptance of differences of nationality, sex, religion and culture; stress the concepts of freedom of opinion and action in the face of the multiple constraints of modern society; promote solidarity with the most deprived in areas; involve people and groups that do not normally have a say in discussions on European policy; and... support (with encouragement and advice) the efforts of the Commission directorates general aimed at furthering collaboration with the churches and religious communities in their area of responsibility, in keeping with Community strategies on peace, development, solidarity and integration."

109 *Id.*, 110, Note 3.

110 *Id.*, p. 110, Note 3.

first time in the history of EU sponsored interfaith meetings included the EC president, Jose Manuel Barroso.

The original Delors association had received privileged funding in then the newly created A-3024 budget line. Yet in 1998 reform came.<sup>111</sup> The budget line was moved to be administered by the DG on Culture and Education and split into A-3021 for “European think tanks and organisations advancing the idea of Europe” and A-3024 for “associations and federations of European interest.” Today, in applying for EU funds the religious organizations are treated as regular NGOs. Only a further description of the A-3024 budget line adds that “it is also intended to support activities connected with reflection at European level on the ethical and spiritual foundations of the building of Europe or providing advice on free movement within Europe.”<sup>112</sup> The language here lacks the gravitas of the debate over vying pagan and monotheistic visions of the future of Europe. One could argue that European interest has replaced the European soul.

The next section examines more examples of the EU’s use of non-democratic means to achieve “social” results; results that seem sometimes at odds with its founding documents and the constitutions of its member states, as well as with Europe’s populace.

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111 Grants to Associations and Federations of European Interest (A-3024), ex-post evaluation report for 2004, Rapport à la Commission européenne – DG EAC N. Réf. R4129BL – 26 mai 2004.

112 DG Education and Culture, Partnership with Civil Society: [http://ec.europa.eu/dgs/education\\_culture/association/index\\_en.html](http://ec.europa.eu/dgs/education_culture/association/index_en.html)

# MORAL REGULATION IN PRACTICE: FAMILY, EDUCATION, SEXUAL ETHICS AND ABORTION

The previous chapter demonstrated that the EU has emerged as one of the guardians of fundamental rights in Europe with its own “bill of rights” and various monitoring agencies and bodies. The EU has exhibited a lopsided focus on egalitarian and anti-discriminatory policies in the areas of human life and sexuality while its engagement with the fundamental normative underpinnings of the European civilization through religious dialogue carries only symbolic weight. The purpose of this chapter is to present selected case studies representative of the EU’s biased engagement in “moral regulatory” matters with specific attention paid to issue of family, sexual education and abortion. In contrast with the previous chapter, most of the examples will focus on actual programs engaged in jointly by the EU and its NGO partners.

## Marriage and Family

Gender policy has a dominant role in the moral regulation of Europe, and gender equality principles are increasingly embedded in its founding documents.<sup>113</sup> A review of the dates of these documents reveals that this set of issues did not arise overnight in 1997 with the Treaty of Amsterdam, but is a unique distillation of many trends coalescing in this policy agenda, which is already a major shaper of European life. The EC’s gender equality and anti-discrimination policies are based on regulations and directives, which then impact a member state’s autonomy.

The major milestones thus have been the following:

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113 THE ROME TREATIES: Article 119 equal pay for equal work; THE SINGLE EUROPEAN ACT (1987): The preamble confirms the European Community’s respect for human rights; THE TREATY OF MAASTRICHT (TEU) (1993): gender equality and the principle of equal pay for work of equal value; THE TREATY OF AMSTERDAM (1997): Article 13 anti-discrimination provision prohibiting discrimination on the basis of gender, racial or ethnic origin, religion, disability, age, or sexual orientation; empowers the Council of Ministers to take action to combat these forms of discrimination; also extended the jurisdiction of the European Court of Justice to cover respect for human rights addressed in Article 6 of the EU Treaty, with regard to action by the EU institutions. This created a strong enforcement mechanism for gender discrimination complaints. Article 2 made equality between men and women a main objective of the European Community, while Article 3(2) outlined the EU task of eliminating inequalities and promoting equality and Article 137 and Article 141 reinforces these tasks in the labor market and in treatment at work. Adapted from Barclay, Erin M., (2003), *International Standards and Implementation Mechanisms on Equal Opportunity and Gender Equality*, prepared for the WORLD BANK INSTITUTE DISTANCE LEARNING DIALOGUE. <http://topics.developmentgateway.org/gendergov/rc/filedownload.do~itemId=379910>.

- 1982–1985 marked the First Action Program for Promoting Equal Opportunity;
- 1986 established the European Commission Network on Child-care;
- 2000 The Lisbon Summit set the goal of reaching an overall 60% female employment rate by 2010.

Anti-discrimination and gender initiatives are shared by two DGs: DG Employment, Social Affairs and Equal Opportunities, and DG Justice, Freedom and Security. These two DGs are the most important for elaborating moral regulatory policy. These initiatives directly create sexual and moral norms that can impinge on traditional notions of family. Other aspects of family law are indirectly regulated when they come in contact with various aspects of EU law, such as employment, social security, transnational enforcement of marital laws, immigration and asylum and freedom of movement. Oftentimes, these areas of law present the opportunity to define terms such as “family” or “marriage relationship.” That is why this legislation merits careful investigation.

The year 2000 witnessed the passage of two powerful anti-discrimination directives, which serve as legislative tools to implement the anti-discrimination guarantees of Article 13 TEC. The story of how these directives came about is instructive. Isabelle Chopin, an activist of the International Lesbian and Gay Alliance (ILGA), had started an initiative called the Starting Line Group. She and her colleagues frequently spoke at the EP in favor of inserting homosexual rights into the Amsterdam Treaty. They succeeded. Then, around the time of the passage of the anti-discrimination directives, Chopin and her colleagues were invited by the EC to create a European branch of ILGA with EC money taken from the “community action program” created to implement the directives in the member states.<sup>114</sup> The anti-discrimination unit charged with coordinating the implementation of the directives has been funded with 200 million dollars over the next seven years, with 20 million earmarked for specific projects involving research and NGOs.

ILGA is officially listed on the DG Employment, Social Affairs and Equal Opportunities (EMPL) anti-discrimination unit website as a chief “umbrella organization,” cooperating with the EC on implementing the sexual discrimination provisions of the directives. It is important to note that ILGA is involved in continuous lobbying for legal reforms leading to the adoption of “gay marriage” laws in the member states. Given the fungibility of money (the EC states that it only covers ILGA’s operating costs), and that

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114 Author’s interview with Commission official of DG EMPL, July 18, 2006.

the comitology<sup>115</sup> committees can tend toward pro-forma oversight,<sup>116</sup> the money ILGA receives from the EC can potentially be spent on promoting initiatives illegal in many EU member states.

While there is no EU “family law,” the Commission issued several directives in the realm of family-work reconciliation, parental leave, and employment gender discrimination, and is thus actively involved in shaping child-parent relations. Other directives treating with gender discrimination most relevant from a family policy standpoint are: the Maternity Directive 92/85/EEC; the Directive on Parental Leave 96/34/EC; and the Directive on Atypical Work (Part-time Work) 97/81/EC. These directives have for their aim reconciling family and professional life. The 1992 Pregnancy or Maternity Directive set a minimum standard for maternity leave of 14 weeks paid at a rate at least equivalent to disability payment.<sup>117</sup> The Directive on Parental Leave and Leave for Family Reasons entitled all workers (men and women) to three months of parental leave and for “urgent family reasons.”

Finally, the Directive on Atypical Work was issued that eliminated all differences in treatment of part-time and full-time workers. Employers are also urged to consider requests for transfer from full-time to part-time work. It is one of the measures aimed at promoting inclusion of women in the labor force, while allowing for flexibility as an incentive to bear children. Member states are required to provide appropriate health and safety equipment for pregnant workers, while parental leave responsibilities are expected to be shared between both parents – with the opportunity for mothers to come back to employment at a similar position after coming back from parental leave.

Rianne Mahon<sup>118</sup> posits that there are three competing visions of child-care that can emerge from the burgeoning competence of the EC in the area of employment and gender: 1) the neo-familialist models of France and Finland; 2) the third-way approach of the Netherlands and the United Kingdom (UK); and 3) the egalitarian model of Sweden and Denmark. The first model is characterized by provision of flat rate cash benefits to families, thus encouraging a conservative model of the family, with the woman often opting for staying at home. The second one is also a demand-side policy that encourages part-time work for mothers and fathers. The third way model in the UK uses a similar instrument, whereby parents are required to work at least sixteen hours a week to receive tax credit.

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115 Note 38 *supra*.

116 Renaud Dehousse, *Comitology: Who Watches the Watchmen?* JOURNAL OF EUROPEAN PUBLIC POLICY, Volume 10, Number 5 / October 2003: 798 – 813.

117 *Id.*

118 Rianne Mahon, *Child Care: Towards What Kind of “Social Europe?”* Paper presented at the 1st IES Annual Colloquium, THE EUROPEAN UNION: ONE MARKET, ONE SOCIAL MODEL? September, 2002.

Which of Mahon's models is the most prominent among the directives? Since there are no benchmarks on childcare provision or any binding provisions on ensuring fathers participation in caring activities, Mahon concludes that the current EU childcare policy is positioned among the three models. Time will show what the ultimate shape of EU policy towards families and children will be. The many different approaches and the subsequent response from affected EU families may prove to be fatal for the imposition of central family policies in Europe, which seem to be reserved for subsidiary actions on the member state level.

What seems to be at stake is to what extent the EU is willing to interpret its gender equality mandate as strictly mandating equal pay for equal time. Pressure is gaining steam for an outcome model of equality in pay along the lines of "same paid time at the same rate" for women and men. This would in effect mandate universal public daycare, "externalizes" children to the realm of state provision, and deemphasizes the "family" aspect of parenting while rewarding the "partnering" aspect. On the other, some feminists<sup>119</sup> have raised the question of whether the family has in fact the right "not to rely on extensive non-familial care for their young children."<sup>120</sup> Quoting German survey research<sup>121</sup> Eileen Trzcinski has noted that German women do not condone the so-called universal care-giver model<sup>122</sup> and see themselves as primary caregivers. German women comprise a third of the workforce and 26 percent of German women are paid below \$500 compared to 6.5 of males<sup>123</sup> and yet construe their identities not along the "laborist" dimension. These differences might prove to be fatal for the imposition of central family policies in Europe, which seem to be reserved for subsidiary actions on the member state level.

Finally, there are directives which indirectly impinge on family policies of the member states. The most important directive is the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. This directive was originally issued in April

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119 Eileen Trzcinski, "Family Policy in Germany: A Feminist Dilemma?" *Feminist Economics* 6, 1 (2000): 21-44.

120 *Id.*, p. 39.

121 Koecher, Renate. 1993. "Lebenszentrum Familie" [Life Center: Families], in *40 Jahre Familienpolitik in der Bundesrepublik Deutschland: Rueckblick/Ausblick* [40 Years of Family Policy in Germany: Overview and Outlook], Bundesministerium fuer Familie und Senioren [Federal Ministry for Families and Seniors], pp. 37-51. Luchterhand: Bundesministerium fuer Familie und Senioren.

122 Fraser, N. "After the family wage: gender equity and the welfare state." *Political Theory* 22 (1994): 591-618.

123 Federal Statistical Office Germany. 1998. *Statistics of the Federal Republic of Germany*. Wiesbaden: Statistisches Bundesamt. Economic and social data published in English on the World Wide Web at <http://www.statistikbund.de/indicators/e>; Statistische Bundesamt 1997.

2004, and later amended. In the original version the definition of the family did not include “registered partnerships.”<sup>124</sup> It also did not mandate that the states, irrespective of their domestic legislation, should facilitate entry of “the partner with whom the Union citizen has a durable relationship, duly attested.”<sup>125</sup> The explanatory document attached to the amended directive states, “The Commission considers that the concept of durable relationship may cover different situations: same-sex marriage, registered partnership, legal cohabitation and common-law marriage.”<sup>126</sup> The European Parliament has also voted positively for many pertinent (non-binding) resolutions and reports (see Appendix A).

## Sexual Education

In general, the area of culture and education seem to be relatively well safeguarded from too much EU intrusion. The treaty basis for activities in the realm of culture and education is Title XII, specifically Article 149 of the TEC. It clearly states that in this field of policy the Council will not act through the means of directives and regulations (laws) but “shall adopt recommendations” and “incentive measures excluding any harmonization of the laws and regulations of the member states.”<sup>127</sup> Even so, the influence of other measures promoting cultural agendas is pervasive, as is seen in the following examples.

The EC’s anti-discrimination unit within DG EMPL has been giving out support grants to educational authorities with the aim of disseminating anti-discrimination tutorials at schools. While the purpose might seem harmless, one of the programs called TRIANGLE (Transfer of Information Against the Discrimination of Gays and Lesbians in Europe)<sup>128</sup> sponsored a consortium of Italian, Dutch and German educational authorities, who created a booklet, financed by the EC, on how to teach children tolerance. The booklet instructs teachers in ways to teach children from religious families, whom they identify as having “problems” with their sexuality, about liberal currents among mainstream religions that condone more license in sexual matters. In other parts of the booklet teachers are cautioned to “not allow the discussion to focus on religious texts or religious rules, but

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124 Directive 2004/58/EC.

125 *Id.* Article 3(2).

126 European Commission, SEC (2003) 1293, Official Journal on 29 June 2004 (L229 29-JUN-01 035 048).

127 Note 33 *supra* (TEC).

128 TRIANGLE/Transfer of Information Against the Discrimination of Gays and Lesbians in Europe: [http://www.triangle-info.de/alt/html/index\\_eng.html](http://www.triangle-info.de/alt/html/index_eng.html); Booklet: [http://www.diversity-in-europe.org/engl/religionen/ix\\_reli.htm](http://www.diversity-in-europe.org/engl/religionen/ix_reli.htm).



on *warm* aspects....”<sup>129</sup> The pamphlet even provides damage control, advising how to talk to potentially disgruntled parents about the controversial content.

The fact that this program is EU funded can be construed as a breach of the very fundamental rights it defends, namely Article 2 of the First Protocol (1952) to the ECHR, which endorses the rights of parents to choose the religious or ideological orientation of their children's education:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.<sup>130</sup>

The community action program to promote anti-discrimination and diversity has come up with inventive ways to animate its cause. It now holds competitions and offers prizes to European journalists and photographers dealing with discrimination in daily life. While in general very noble in their aims, there were some articles that in no straightforward ways condemned the autonomy of religious institutions on the question of sexual discrimination guaranteed to them in Article 4 (2) of the Anti-Discrimination Directive, which states:

Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.<sup>131</sup>

Despite the religious exception clauses in the directive, an article by Laurits Nansen condemning Christian schools' preferences for heterosexual teachers

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129 *Id.* (Emphasis added).

130 ECHR at Hellenic Resources Network Website <http://www.hri.org/docs/ECHR50.html#P1.Art2>.

131 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

was included in the 2005 diversity award. Even if the Danish law does not contain the ethos clause exempting religious organizations from some anti-discrimination measures, the very fact that the EU jury selected it accusing the Danish evangelical schools of “hypocrisy and lack of tolerance”<sup>132</sup> speaks volumes about a political coloring of jury’s decision. In another example, one of the photographs that won in the competition was called “the Mother-Priest” and received an unambiguous praise from the jury:

The Jury particularly liked the way it subtly portrays the struggle by women for employment equality in the Church, and the way it presents a working-mother alternative to the established iconography of ‘mother and child.’<sup>133</sup>

The EU jury justification leaves no doubt as to what model of education and church-state relations it favors, irrespective of legal language contained in the very directives it promulgated.

### Promoting Sex Among the Youth

In 2001 the DG on Culture and Education issued a White Paper, in which it spelled out a proposed program of action.<sup>134</sup> While laudable in a its ambitions to promote “mobility and exchange schemes for young people,”<sup>135</sup> it nevertheless betrays an ambition of the EC to enlarge the scope of its activity to “a number of subjects – such as *participation or autonomy of young people* – which are not directly a Community concern, but which merit in-depth analysis.”<sup>136</sup> The EC goes on to say that “our societies will have to diversify in ethnic, religious, social and linguistic terms. And all this will have to be *properly controlled*, particularly with regards to young people....”<sup>137</sup> Under the heading, “Getting the Most Out of Being Young,” the claim is made that youths demand more “openness on sexuality,”<sup>138</sup> and that “They [youth] also advocate the legalization of abortion.”<sup>139</sup> Given the EC’s claim that “in terms of scale, duration, the diversity of the people consulted and

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132 Jury comments, Journalist Award 2005, p. 36: <http://www.journalistaward.stop-discrimination.info/643.0.html>

133 *Id.* p. 246.

134 The European Commission, *A New Impetus for Youth*, White Paper, Brussels 21.11.2001, COM (2001) 681 final, 15. [http://64.233.167.104/search?q=cache:SVhSzg86LgJ:ec.europa.eu/youth/whitepaper/download/whitepaper\\_en.pdf+the+european+union+a+new+impetus+for+youthy&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a](http://64.233.167.104/search?q=cache:SVhSzg86LgJ:ec.europa.eu/youth/whitepaper/download/whitepaper_en.pdf+the+european+union+a+new+impetus+for+youthy&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a).

135 *Id.* 6.

136 *Id.* 7 (emphasis added).

137 *Id.* 9 (emphasis added).

138 *Id.* 48.

139 *Id.* 49.

the wealth of information drawn from it, the exercise is unprecedented at European level,”<sup>140</sup> it would be remarkable indeed if this claim of unanimity among youth on the question of abortion were true. But this is unlikely, since at least one of the lobbyists in the EU is the World Youth Alliance (WYA), which supports the defense of human life from conception onward, and regularly testifies in committees to this effect.<sup>141</sup>

On the basis of the White Paper on Youth the Council has issued a Decision authorizing the Commission to create a community action program, YOUTH, aimed at assisting international youth organizations in financing exchanges. It is operated by the DG on Culture and Education. A quick look at the financed projects shows that some orthodox religious organizations (i.e. Syndesmos – the World Fellowship of Orthodox Youth) received EU funding. Still, the mode of consulting large corporate youth organizations (e.g. European Youth Forum) appears to lead to the exclusion of some youth voices.<sup>142</sup> In fact, one of the darlings of the EC, the European Youth Forum, actively supports organizations involved in direct or indirect support of abortion. In its 1997 statement on Gender Equality and Youth Policy it clearly states its intentions:

The Youth Forum will:

- Cooperate with EU and relevant international Health Authorities, AIDS foundations as well as the International Planned Parenthood Federation in order to develop efficient information strategies which meet the needs of young women of all sexual orientations;
- Ensure access to information about safer sex, condoms and other safer sex materials at European Youth Forum and Member Organisation activities.<sup>143</sup>

As most so-called “umbrella organizations” the European Youth Forum has been awarded an exclusive budget line A-3023 (15 07 01 01) and has been enjoying the privileged position as the one-stop-shop for EU's youth programming.

## Advancing the Abortion Agenda

Within the EU there are no binding laws concerning the availability of abortion, as these still remain within the purview of the member states.

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140 *Id.* 11.

141 WORLDYOUTHALLIANCE (WYA) CHARTER, WYA Website. <http://www.wya.net/charter/index.html?catid=4>.

142 *Id.*

143 European Youth Forum, Gender Equality and Women's Policy Adopted at EYFo Executive Committee 20-23 November 1997, p.6.

Notwithstanding this, some member states annexed Protocols trying to safeguard themselves from future developments affecting their constitutional and legal orders. Ireland annexed its protocol to the Maastricht Treaty, Poland and Malta to their accession treaties. Article 40.3.3 of the Irish Constitution defended in the Protocol states:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees its laws to respect, and, as far as practicable, by its laws to defend and vindicate this right.<sup>144</sup>

A group known for its support for abortion activities is Marie Stopes International (MSI). It instructs the visitors of its website on how to receive EU funding from the appropriate budget lines. In 2003 Dana Scallon, a pro-life Member of the European parliament (MEP), protested against moving money from the fisheries budget into a program funding MSI.<sup>145</sup> In 2002, MSI issued “Reproductive Health –A Briefing Pack.” It encourages civil society organizations to “advocate for changes to laws and policies hampering access to programmes such as safe abortion and services to adolescents.”<sup>146</sup> It also includes case studies from MSI-EU collaborative projects in the developing world. The briefing pack has been welcomed by EU representatives.<sup>147</sup> In another MSI publication, “Handbook on European Community Support,”<sup>148</sup> the preface is written by the EU Commissioner for Development, Paul Nielsen. This type of unabashed support for an abortion providing organization by an EU civil servant can be seen as another sign of pervasive partiality on the part of the EC.

The EC funds other organizations involved in the active lobbying for the change of abortion policies in the member states. For example, under the 5<sup>th</sup> Research Framework, the EC funded a three year project called the Network for European Women’s Rights (NEWR), which in its concluding statements says:

It is often assumed that this “battle” for women’s autonomy has been won and that the right to abortion has, for the most part, been granted and is unassailable. However, country reports produced at the NEWR

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144 CONSTITUTION OF IRELAND. [http://www.taoiseach.gov.ie/attached\\_files/html%20files/Constitution%20of%20Ireland%20\(Eng\)Nov2004.htm](http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20(Eng)Nov2004.htm).

145 “European Union Dumps \$81 million on abortion organization,” Lifesitenews, January 13, 2003: <http://www.lifesite.net/ldn/2003/jan/03011504.html>.

146 REPRODUCTIVE HEALTH-THE BRIEFING PACK, 11. Marie Stopes International website. <http://www.mariestopes.org.uk/pdf/english-inserts.pdf>.

147 *Id.*

148 HANDBOOK ON EUROPEAN COMMUNITY SUPPORT, Marie Stopes International website. [www.mariestopes.org.uk/pdf/eurobook-smaller.pdf](http://www.mariestopes.org.uk/pdf/eurobook-smaller.pdf).

workshops have proved this is not the case. The opening of the EU to the East has brought in strong, religion-based views on abortion and the relatively liberal abortion legislation from the Soviet era is gradually being overturned... Therefore lobbying to maintain the right to abortion where it exists and establish it where it does not is still very much at the centre of women's reproductive agenda.<sup>149</sup>

Another way the EU advances the abortion agenda is through the use of treaty provisions in the TEC pertaining to aid to developing countries. Title XX on Development Cooperation Articles 177–178, clearly spells out that the EU can take necessary measures leading to policies aimed at “respecting human rights and fundamental freedoms” in developing countries. As previously addressed in this study, the promotion of these “rights” and “freedoms” often means promoting abortion. It also allows the EU to undertake “joint action” (Article 180) with international NGOs in this field.<sup>150</sup>

Within the ambit of fostering cooperation with third countries, the treaty gives the EU open ended authority to work with international NGOs in the sphere of public health.<sup>151</sup>

The sexual health aid regulation has been lobbied for by MSI and other abortion advocacy groups. It is based on the controversial opinion of the EP reported by MEP Ulla Sandbaek (the Sandbaek Report A5–0020/2003) under the co-decision procedure. It allows for the financial regulation to finance abortion from the development aid budget and is instrumental in filling the UNFPA funding gap created by the George W. Bush's administration in a clear rebuttal of the UNFPA's abortion agenda. Although the EC does not have exclusive competence in the field of development aid the then DG DEV Commissioner Paul Nielson waved away this restriction when he stated boldly:

We are strongly engaged in this area and the relationship between poverty, conflict, AIDS and gender equality is so strong that we have

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149 Audrey Guichon, Rebecca Shah, Christien van den Anker, Heather Widdows and Sirkku Hellsten, *NEWR State of the Art Report on European Women's Rights*, September 2005, NEWR website: <http://www.newr.bham.ac.uk/general/NEWR%20State%20of%20the%20Art%20Final.pdf>.

150 Note 33 *supra* (TEC).

151 The chief pieces of legislation regulating EU's assistance to the developing world are: Council Regulation 1567/2003 on aid for policies and actions on reproductive and sexual health and rights in developing countries; Council Regulation 975/1999 on developing and consolidating democracy and the rule of law and respecting human rights and fundamental freedoms; Council Regulation 2836/98 on integrating gender issues in development cooperation; Council Regulation 1484/97 on aid to developing countries; and Council Regulation 550/97 on HIV/AIDS-related operations in developing countries.

absolutely no doubt in our mind as to the need to react strongly and immediately to the threat coming to the US administration in this field. I announced in the UN in New York in January that Europe is able and willing to fill the decency gap and we will do that.<sup>152</sup>

It is instructive to compare a broad mandate of the EU to promote reproductive rights abroad with a limited one at “home.”<sup>153</sup> Title XIII on Public Health Article 152, allows the EU only to “complement member state action,” “encourage cooperation” and “foster cooperation with third countries...toward improving public health, preventing human illnesses and diseases, and obviating the sources of danger to human health.” As opposed to development cooperation, but similarly to cultural policy, the EU cannot promulgate directives and regulations. Yet it can set “incentive measures designed to protect and improve human health, excluding any harmonization of the laws of the Member States.”<sup>154</sup> The EU cannot promulgate expansive sexual health measures within the member states as it is limited in the treaty to promoting incentive measures. Still, just as in the realm of cultural policy the DG Health sees its role as an enforcer of the liberal agenda of reproductive rights. In its recent communication<sup>155</sup> the DG Health states:

HIV/AIDS strategies are closely linked to strengthening the general European values on human security and the protection of human rights, including sexual and reproductive rights ...

An illustration of the way abortion advocates in the EU advance their agenda is the 2000 UN conference on women’s rights. At this five year follow-up meeting to the UN women’s conference in Beijing, the EP Women’s Rights Committee in pressured the Polish delegation to support the EU line on reproductive rights and abortion – even against Poland’s own constitutional provisions – or jeopardize Poland’s acceptance into the EU. In the end, the issue of reproductive rights was not included in the so-called “joint inclu-

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152 *Response to Written Question E-0431/01 by Bastian Belder (EDD) to the Commission. Letter of 26 January 2001 from Minister Herfkens of the Netherlands to the Commissioner Nielson for Development Programmes Concerned with Abortion.*

153 Directive 2003/86//EC on the right to family reunification. The directive, as opposed to the Free Movement Directive, does not include “registered partnerships” in the definition of family and defines the nuclear family as including the spouse and minor children.

154 *Id.*

155 Communication from the Commission to the Council and the European Parliament on combating HIV/AIDS within the European Union and in the neighbouring countries, 2006-2009, Brussels, 15.12.2005COM(2005) 654.

sion memorandum” that measured Poland’s progress towards EU accession, and the action by the EP Women’s Rights Committee was condemned by 32 members of the EP.<sup>156</sup>

This overview of the general legislative and policy environment of the EU has attempted to illustrate that the scope for political controversy over social issues is significant. Given the fact that the expansion of the EU’s fundamental rights agenda is correlated with the EU’s penchant for governance through NGO involvement, the democratic deficit moves into areas that decide constitutional normative frameworks in which so-called normal politics takes place. The examples above show that, increasingly, social policy regulation in the EU attaches itself to the realm of religion and fundamental human rights, rather than to the realm of pure distributive or technical/regulatory politics.

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156 *Report to the Declaration of the National Council of the Slovak Republic on the Sovereignty of the Member States of the European Union in the Cultural and Ethical Issues*, KDH (Christian Democratic Movement) 2002.

# IMPLICATIONS AND POLICY RECOMMENDATIONS

The political interpretation of the moral regulation agenda in the pre-enlargement era (before 2004) mainly exhibited a secular and a liberal bias due to the left-of-center value consensus in the old EU-15. The point of conflict with the social conservative agenda came with the application of human rights to matters of family, education and sexual ethics of new member states. The growth in the fundamental rights agenda of the EU, which often challenges the human rights consensus of the European Convention of Human Rights (ECHR), is of particular concern. The EU institutions and courts, in contrast to the other treaty-based European organization (the Council of Europe and its human rights court in Strasbourg), are not willing to grant a “wide margin of appreciation” to the member states in dealing with sensitive moral concerns.

## **Biased Sponsorship of NGOs**

What emerges from this discussion is the profoundness of the EU’s “democratic deficit.” Its consultative operation is selective in the choice of privileged partners, biased in its ideological coloring, and largely removed from the democratic oversight process by EU member states. Indeed, one of the most dangerous trends in EU governance is the technocratic view that representation of social views on the EU level is done better by uncritically involving “civil society organizations,” rather than democratically elected bodies of the member states. The Social Platform is an organization consisting of multitude of members some of which are also umbrella organizations for other groups. These self-styled representatives of civil society are the main recipient of EU funds often with their own budget lines, such as the European Youth Forum, itself a member of the Social Platform, European Women’s Forum, and the International Lesbian and Gay Association. Yet the EC seems to make no effort to ascertain (and is probably unable to ascertain) the relative biases involved in interest group representation on the EU level.

There may be no “objective” way of assessing the whole gamut of social interests, but it is certainly not done by uncritically promoting the most visible civil society organizations. They do not possess the democratic legitimacy of political parties and are prone to rely on financial advantages given to them by often uncontrolled private donations. That they enjoy EU funding in the aftermath of their successful campaigns in no way legitimizes their rise and their claim to represent truly European interests. In a recent pair of articles, Duke University law professor Francesca Bignami has warned against “co-regulation” in the EU by involving “civil society organizations”



conveniently renamed from the more classic and accurate “pressure groups.”<sup>157</sup> She found that:

The public good is not crafted by the Commission and the interests and associations to whom it listens. These depictions of civil society governance paint a civic world in which public authority can somehow operate without conferring benefits and inflicting costs, excluding some groups and including others, and creating political winners and losers. In the technocracy narrative, when a choice is made to consult on a particular issue, to consult only certain groups, or to accept comments from some over the objections of others, it is because of the objective nature of the policy problem. Public servants select areas for consultation by defining them as technical problems in need of information. They ask certain organizations for comments and accept their suggestions because those organizations have the necessary resources, expertise, and knowledge. I certainly do not deny that expertise and science have a legitimate place in policymaking, but applied to interest groups the concepts are problematic because they mask the use of knowledge to frame problems, represent partial world views and shape political agendas.

EU member states should insist on transparency and accountability in this regard. A good start is with a recent Green Paper on the European Transparency Initiative.<sup>158</sup> One of the proposals is turning the unofficial registry of EU lobbyists and interest groups CONNECS<sup>159</sup> into a mandatory register of all groups receiving funding from the EU. Second, what is needed is a grants database, which would display all grants awarded to each beneficiary. It could be modeled on similar initiatives currently being proposed in the US Congress (Federal Funding Accountability and Transparency Act).<sup>160</sup>

### **Unaccountable Community Programs and Expert Networks**

Through a biased political sponsorship and funding of civil society groups mostly inimical to traditional values, the European Commission has sponsored community programs that directly question the reserved competence and rights of the intermediary institutions of family, education and the church. Unaccountable “expert networks” attached to the EC and EU agencies act with no democratic surveillance and their “independent” reports have been

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157 *Id.*

158 The European Commission, *Green Paper on the European Transparency Initiative*, COM (2006) 194 final, Brussels, 3 May 2006.

159 CONNECS: [http://ec.europa.eu/civil\\_society/coneccs/index\\_en.htm](http://ec.europa.eu/civil_society/coneccs/index_en.htm)

160 US Senator Tom Coburn (R-OK):

<http://coburn.senate.gov/public/index.cfm?FuseAction=RightNow.Home>

used by the EC to bully countries such as Slovakia into compliance with the “expert” interpretation of EU law. Governments should increase the role of comitology committees or establish national centers to monitor the activities of EU bureaucrats so that they remain within the proper understanding of the treaties.

### **Increased Role of the European Parliament**

The 2004 elections to the European Parliament witnessed a much more vigorous group of social conservatives taking part in the debates over fundamental rights, equality and anti-discrimination. There have also been instances of domestic politicization of these issues, as in the cases of the fall of the Slovak government and the debates over the ratification of the Anti-Discrimination directives in Latvia. The recent creation of the transnational movement of conservative Christian Democratic parties, which attract many parties from the new member states, is also a telling sign that the liberal value-consensus in Europe faces some criticism among the new member states, and not only there. All in all, given the continuing trend of constitutionalizing and legislating fundamental rights in the EU, the clash between social conservative and liberal/secular voices in EU politics may be heard even more frequently. Lastly, the non-binding resolutions of the EP need to be voted by name votes so that member state officials and their citizens know who has voted and for what. For too many years mainstream Christian Democrats escaped effective voter scrutiny through anonymous votes.

### **Flawed Nature of the Charter of Fundamental Rights and the new Reform Treaty**

Soon the ratification process of the new Reform Treaty will take place across Europe. The Reform Treaty makes reference to the EU Charter of Fundamental Rights as belonging to the general principles of EU law. Given the legitimate doubts whether the inclusion of the Charter will improve the already high level of rights protection in the EU while posing a threat to the consistency of the ECHR framework, governments should be encouraged to sign a British protocol, which clarifies the scope of the Charter.<sup>161</sup>

### **Growing Tension in the Enlarged EU-27**

EU moral regulation is provoking political tension in Central and Eastern countries, which did not fully ascertain the ramifications of pre-enlargement treaty revisions in 1992 and 1997 regarding social policy during the accession

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161 Council of the European Union, the Presidency Conclusions, 20 July 2007, p. 25 (see the text on the website of the Council of the European Union: [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/94932.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf)).

process. Controversy between the EU and new member states has become commonplace, and both political attention and further research are necessary to fully address and understand the political and social implications of the emerging divergence.

## CONCLUSION

Because of a confluence of various factors in EU formation and integration, bureaucracies in Brussels have successfully expanded the scope of moral regulation in Europe. This is happening even though the EU has, at most, only shared competence with the member states in matters of social policy. At the same time, many national leaders remain on the fence about whether or not to push back. This is due in part to a belief that EU member states will ultimately be protected from encroaching EU bureaucracies through the practical realization of subsidiarity. As this study has demonstrated, however, the factors leading to concentration of power in Brussels are likely to persist if not accelerate in the coming years. Subsidiarity, ill-defined and practically ineffectual on social policy matters, is unlikely to help. What is more, given the trends examined in this study, states will be less able to regain protection of their national laws and culture in coming years than they are today. Only timely and effective action by national capitals to demand transparency and accountability and to retain their authority on social policy can protect and preserve national traditions on marriage, family, and human life – arguably the most important issues of our time.

## ACRONYMS

<b>CDLR</b>	Steering Committee on Local and Regional Authorities
<b>CULT</b>	Committee on Culture and Education
<b>DEVE</b>	Committee on Development
<b>DGs</b>	Directorates General
<b>DROI</b>	Committee on Human Rights
<b>EC</b>	European Council
<b>ECHR</b>	European Convention on Human Rights
<b>ECJ</b>	European Court of Justice
<b>ECOSOC</b>	European Social and economic Committee
<b>ECourtHR</b>	European Court of Human Rights
<b>ECSC</b>	European Coal and Steel Community
<b>EMPL</b>	Employment and Social Affairs
<b>ENVI</b>	Committee on Environment, Public health and Food Safety
<b>EP</b>	European Parliament
<b>ESF</b>	European Social Fund
<b>EU</b>	European Union
<b>FEMM</b>	Women's Rights and Gender Equality
<b>ILGA</b>	International Lesbian and Gay Alliance
<b>LIBE</b>	Committee on Civil Liberties, Justice and Home Affairs
<b>MEP</b>	Member of the European Parliament
<b>MSI</b>	Marie Stopes International
<b>NEWR</b>	Network for European Women's Rights
<b>NGO</b>	Non-governmental Organization
<b>OMC</b>	Open Method of Coordination
<b>QM</b>	Qualified Majority
<b>SEA</b>	Single European Act
<b>TEC</b>	Treaty of the European Community
<b>TEU</b>	Treaty on the European Union
<b>TRIANGLE</b>	Transfer of Information Against the Discrimination of Gays and Lesbians in Europe
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>VAT</b>	Value Added Tax
<b>WTO</b>	World Trade Organization
<b>WYA</b>	World Youth Alliance

## APPENDIX A

### **Pertinent Non-Binding Resolutions of the European Parliament**

The following instruments are resolutions of the European Parliament (EP). While they are not legally binding on EU member states, they are used to set the agenda in the EP and have been used to pressure member states to change national laws and policies.

- Roth Resolution on equal rights for homosexuals and lesbians in the European Community, OJ 1994 C 61/40, Resolution no A3-0028/94.
- The Vayssade Report on Staff Regulations proposing equal treatment for civil servants working in European Union Institutions living with for same sex partners (1994).
- The Lindholm report on Staff regulations (1997).
- Resolution on respect for human rights in the European Union, A4-0223/1996.

54. Reminds Member States that equality between men and women rests upon the full control of one's sexual and reproductive health and rights, free of coercion, discrimination and violence, and with the concomitant access to information and services that this requires;

59. Deplores the fact that some Member States still have a discriminatory age-of-consent provision for homosexual relations in their criminal codes as well as other forms of discrimination, in particular within the army, although various competent human rights bodies and Parliament itself have condemned these provisions; repeats its demand for such clauses to be repealed;

60. Notes with satisfaction that the United Kingdom is undertaking to change the relevant legislation, but notes with deep concern that Austria continues to apply Article 209 of its Penal Code in persecuting homosexuals; urges Austria once more to repeal this discriminatory provision, and immediately to give amnesty to and to release from prison all persons imprisoned because of this provision;

76. Calls on candidate countries to ratify all the Council of Europe Conventions on human rights and calls on Bulgaria, Cyprus, Estonia, Hungary, Lithuania and Romania to remove from their penal codes all laws which entail discrimination against lesbians and homosexuals;

- Resolution on Respect for Human Rights in the European Union, 11350/1999 - C5-0265/1999 -1999/2001(INI).

84. Calls, pursuant to its resolution of 8 February 1994, on equal rights for homosexuals and lesbians in the EC, for the abolition of all discrimination against and unfair treatment of homosexuals, particularly as regards the differences which still persist with regard to the age of consent and discrimination with regard to the right to work, criminal law, civil law, law of contract and economic and social legislation;

- The Hermange Report A4-0004/1999.

This is a rare, generally family-friendly report, which outlines the comprehensive family policy with the focus on the well being of a child. Still, the recommendation for the centralization of family policy on the EU level is highly controversial.

- Resolution on women and fundamentalism, 2000/2174(INI), adopted 13 March 2002.

This resolution is a radical attack on major religious faiths and the promotion of the culture of life. It also under the guise of “women’s rights” wanted to force abortion on the then acceding new EU member states. It deserves to be quoted at length:

Article 4 says that the European Parliament “condemns the administrations of religious organizations and the leaders of extremist political movements who promote racial discrimination, xenophobia, fanaticism, and the exclusion of women from leading positions in the political and religious hierarchy.”

Article 23 says the EP “insists that the Commission ensure that in negotiations for accession, cooperation, or association agreements the Community ‘acquis’ in the field of women’s rights is upheld.”

Article 31 of the resolution says the EP “calls on all believers of whatever creed to promote equal rights for women, including the right to control their own bodies and the right to decide when to have families of their own, their lifestyles, and their personal relationships; calls on the Member States to adopt legislation to outlaw any practice which endangers the physical or mental integrity and health of women.”

Article 33 says the EP “expresses support for the difficult situation of lesbians who suffer from fundamentalism, and calls on religious lead-

ers, including the Romanian Patriarch and the Pope, to change their attitudes towards these women.”

Article 29 says the EP “considers the separation of church and state to be the only acceptable form of government in a democratic society; calls on the Member States to remain neutral vis-a-vis the various religious creeds, to retain their secular character, ensuring a complete division of responsibilities between church and state, and to abolish any legal and practical obstacles to the performance of religious duties and the use of religious symbols, insofar as religious precepts are compatible with national legislation, the rule of law, and international conventions.”

- The Van Lancker Report on sexual and reproductive health and rights, 2001/2128 (INI).
- Resolution on the report from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the state of women’s health in the European Community, 1999 O.J. (C 175) 68.

12. [EP] recommends that, in order to safeguard women’s reproductive health and rights, abortion should be made legal, safe and accessible to all.

- The Bastos Report (A5-0092/2004) on reconciling professional, family and private life.
- Resolution on homophobia in Europe (P6\_TA(2006)0018)

The resolution calls on the member states to prosecute “homophobia.” Which is defined as “irrational fear and aversion towards lesbians, gays, bisexuals and transsexuals.” Notwithstanding its apparent and noble aim to fight unjustifiable discrimination of this part of its populace, it is unprecedented on a world-wide scale to recommend the prosecution of emotional feelings.



## APPENDIX B

### Funding

Programmatic and budgetary means are an important part of advancing social policy agendas. The following are some of the most pertinent to matters of family, religion and human life:

Selected Appropriations:

- DG Justice, Freedom and Security  
     Appropriations: \$600 million (Most goes towards migration and border security)  
     Relevant programs of interest: Item 18 04, Fundamental rights and Citizenship: \$32.6 million.

The establishment of this program is also based on proposals for Council Decisions using Article 308 TEC to legislate in fields it does not have explicit law making powers.<sup>162</sup>

- DG Education and Culture  
     2006 Appropriations: \$1.2 billion  
     Most of the funding goes for vocational training  
     Relevant programs of interest:
  - Item 15 06, Fostering European citizenship: \$27.6 million
  - Item 15 05 55, Youth in action: \$114 million
- DG Employment, Social Affairs and Equal Opportunities  
     2006 Appropriations: \$11.4 billion  
     Most of the funding goes into the European Social Fund used mostly for employment programs  
     Relevant programs of interest:  
     The PROGRESS program (Item 04 04 01, \$77.9 million):
  - Item 04 04 01 04, Anti-discrimination and diversity: \$19.5 million
  - Item 04 04 01 05, Gender equality: \$7.2 million
     Others:
  - Item 04 04 02 01 and Item 04 04 02 02, Gender Institute: \$4.5 million

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162 Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union (COM (2005) 280 final dated 30.6.2005); Proposal for a Council Decision establishing for the period 2007 to 2013 the specific programme 'Fundamental rights and citizenship' as part of the General programme 'Fundamental Rights and Justice' (COM (2005) 122 final dated 6.4.2005).

- Item 04 04 06: 2007 Year of Equal Opportunities: \$9 million
- Item 04 04 09, Financing the Platform of European NGOs: \$0.620 million
- DG Development
  - 2006 Appropriations: \$1.2 billion
  - Relevant programs of interest:
    - Item 21 05, Human and social development: \$117.2 million
    - Item 21 03, Non-state actors: \$206 million
  - Within this budget, Budget Line B7-6212 on Aid for Population and Reproductive Health including HIV/AIDS, in Developing Countries and Budget Line B7-6000 on financing NGOs are the most popular among reproductive health advocates.
- DG External Relations
  - 2006 Appropriations: \$3.4 billion
  - Relevant programs of interest:
    - Item 19 04 02 02, Human rights and democracy – Activities under horizontal and geographical coverage of the European Neighbourhood Policy Instrument: \$31 million

The budget line description states the funds should be used for “encouraging less well represented groups to gain a voice and participate in civil society and the political system, combating all forms of discrimination, and strengthening the rights of women and children.”<sup>163</sup>

- DG Health and Consumer Protection
  - 2006 Appropriations: \$530.9 million
  - Relevant programs of interest:
    - Item 17 03 06: Programme of community action in the field of public health: \$37.2 million (2007–2013)

The Council decision authorizing this appropriation is pending. It will include funding for HIV/AIDS as stipulated in the DG Health’s Communication.<sup>164</sup>

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163 European Commission, [http://eur-lex.europa.eu/budget/data/P2007\\_VOL4/EN/nmc-titleN188CA/nmc-chapterN190D8/articles/index.html#N60591451600-18](http://eur-lex.europa.eu/budget/data/P2007_VOL4/EN/nmc-titleN188CA/nmc-chapterN190D8/articles/index.html#N60591451600-18)

164 Note 155 *supra*.





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