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Can European Union Law Help?

Elizabeth Shaver Duquette*

I. INTRODUCTION

As human rights law evolves within the European Union ("Union" or "EU"), the question becomes, how far will its net reach? In recent years, the mentally disabled have achieved rudimentary milestones necessary for future broad protection and promotion of their human rights. This law, however, has developed largely around western-European notions of privacy and basic human rights. As the Union expands to include former Eastern-bloc and Soviet states, the law must be sensitive to the issues unique to those countries. The major overhaul of governmental and social systems in the applicant countries has uncovered countless violations of human rights which are horrific by Western standards. The challenge facing the EU now is how to gently impose its own body of human rights law on societies undergoing massive social reform. This article focuses on Hungary and asks how European Union law can protect and promote the human rights of the mentally disabled.

A. Overview of European Union Law

To protect and promote human rights, any human rights, the EU must have the power to act. It is therefore helpful to have a basic understanding of the EU's structure. The labels European Union and European Community ("Community" or "EC") are often used interchangeably. They are not the same entity. Generally, the European Community is akin to a federal structure, and the EU is largely intergovernmental.

The EC began when Belgium, France, Germany, Italy, Luxembourg and the Netherlands signed the European Economic Treaty, which came into force on January 1, 1958. The European Union was created by the Treaty on European Union in 1993. It has no legal personality, but functions as the overarch-

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The EC is now one of three communities which together comprise the First Pillar. Since the 1960s the EC has steadily developed a body of human rights law. The Second Pillar addresses the Common Foreign and Security Policy of the EU and has some provisions on human rights. The Third Pillar deals with police and judicial cooperation in criminal matters and is not relevant to this article. While the EU and EC share institutions, like the Council, Commission, and European Parliament, the powers of those institutions vary depending on the pillar under which the action is being taken.

B. Relevancy of European Union Law

As Hungary is not yet a member of the EU, one may question the relevancy of EU law altogether. Hungary applied to join the EU on March 31, 1994, and full membership is anticipated soon. With membership comes rights as well as obligations, including the obligation to respect the human rights of the mentally disabled. The EU has developed a body of human rights law that protects the mentally disabled specifically and generally. As a future member of the EU, Hungary will have to uphold these laws. The article will examine existing and anticipated EU law concerning the mentally disabled. Additionally, there is a growing body of general human rights law within the EU. This article will discuss how the EC and EU address the issue of human rights generally, as well as whether the mentally disabled are identified as a group deserving specific protections under these general rights.

It is important to note that the rights and obligations of EU membership do not necessarily begin with membership. Rather, some exist from the moment a country applies to join the Union. A so-called “Europe Agreement” governs the relationship between Hungary and the EU, including the conditions Hungary must meet before joining the Union. Human rights is only one of many topics covered by the agreement, but depending on the political status of a country, it can be a critical consideration throughout the application process. The Europe Agreement obliges Hungary to (1) adopt the acquis communautaire, which includes numerous human rights provisions, and (2) harmonize its national laws to be consistent and compatible with EU law. To


3. The two other communities in the First Pillar are EURATOM, which addresses the non-military use of atomic energy, and the European Coal and Steel Community, which expires on July 23, 2002.

4. TEU, supra note 2, at art. 5.

5. Günter Verheugen, From Copenhagen 1993 to Copenhagen 2002, Address at the European Policy Centre Seminar (June 6, 2002).

6. For example, in 1999, the Commission concluded that Turkey did not meet the EU standards for human rights protection. The EC has been negotiating accession with Turkey for more than 20 years, which suggests that the consequences of failing to approximate laws and failing to honor the conditions of the Europe Agreement can be severe.

7. The acquis communautaire is the entire body of existing EU laws and regulations.
fully harmonize its laws, Hungary must ensure that its laws, including those concerning the rights of the mentally disabled, do not conflict with EU treaties, legislation, and general principles.

C. Related Areas of Law Specific to Europe

The Council of Europe should not be confused with the European Community or Union. The Council of Europe began on May 5, 1949,8 almost nine years before the birth of the European Community. While it is closely related to the EC, the Council of Europe followed a parallel, but separate, path. The Council of Europe is an intergovernmental organization that aims to protect and promote human rights, democracy, and the rule of law.9 Hungary joined the Council of Europe on November 6, 1990, making it the first former Eastern bloc nation to join. There are currently 43 members.10

In 1950, the Council of Europe created the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention") — the first international instrument safeguarding human rights. While the EC is not a member, as will be discussed in greater detail, it does recognize the principles that are central to the Convention. Hungary ratified the Convention on May 11, 1992. Consequently, it must respect certain rights and obligations arising from it. In 1959, the Council of Europe established the European Court of Human Rights to ensure that the contracting states meet their obligations under the Convention.

Overall, the totality of the Council of Europe is an effective tool in the battle to promote human rights throughout Europe. While this article will not attempt to discuss this body of international law with specificity, it does provide a useful basis of comparison to more fully evaluate the effectiveness of EU human rights law.

II. EU Activity Concerning the Mentally Disabled

Because the European Community began primarily as an economic organization, legislation on matters that are not purely economic is fairly new. In the last decade, the EU has enacted legislation concerning the mentally disabled, including provisions for action programs, funding for rehabilitation centers and programs designed to integrate the mentally disabled into main-

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10. Current members are Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the "former Yugoslav Republic of Macedonia," Turkey, Ukraine, and the United Kingdom.
stream society. An overview of highlights of the EU’s past efforts in this area shows that activity is increasing and becoming more focused.


In 1992, the European Parliament\textsuperscript{11} published a report on the mentally handicapped in the European Community.\textsuperscript{12} Specifically, the European Parliament recommended Member State action benefiting the mentally disabled in the areas of civil rights, education and training, employment and social security, and care and accommodation. In the civil rights arena, the European Parliament called for a uniform standard for defining the legal status of the mentally handicapped, guaranteed access to the courts, a curb on sterilization, and equal treatment of men and women.\textsuperscript{13} In the area of education and training, the Parliament recommended early intervention to ascertain the nature of and appropriate treatment for each individual’s handicap, integration of mentally handicapped children with other children, financial support for necessary special programs, and sufficient resources to train those who train, educate and care for the mentally handicapped.\textsuperscript{14} To better the employment and social security of the mentally disabled, Parliament invited the Member States to ensure that there are suitable jobs available, which are supported by on-going training programs, as well as the creation of a basic social security for the mentally disabled, including a minimum wage and pension.\textsuperscript{15} Parliament’s suggested improvements for care and accommodation included smaller facilities instead of large institutions, financial support for caregivers and families of the mentally disabled, and increased public awareness programs.\textsuperscript{16}

The European Parliament’s plea for compassion and action is straightforward. In its report it said, “The weak must be protected in a people’s Europe. The yardstick for dealing with the mentally handicapped must always be the respect for human dignity.”\textsuperscript{17} While this report has no legal effect, the opinion of the European Parliament tends to be a barometer of public opinion throughout Europe, to which the Council and Commission of the European Union are sensitive.

Following its 1992 report, the Parliament issued two resolutions concerning the disabled generally, as opposed to the mentally disabled specifically. It

\textsuperscript{11} The European Parliament is and institution of the EC, and is intended to represent the people of the Community. Under the EC Treaty, it has few legislative powers. For a full discussion, see T.C. Hartley, \textit{The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community} 27-36 (4th ed. 1998).


\textsuperscript{13} \textit{Id.} at 5-6.
\textsuperscript{14} \textit{Id.} at 6-7.
\textsuperscript{15} \textit{Id.} at 7-8.
\textsuperscript{16} \textit{Id.} at 8-9.
\textsuperscript{17} \textit{Id.} at 11.
makes no distinction in its resolutions between physically and mentally disabled persons. Rather than focus on concrete treatment or preventative programs for the disabled, the European Parliament takes on the broader injustices of exclusion and discrimination which prevent assimilation into mainstream society and the realization of one’s full economic potential. Like non-disabled persons, disabled persons should have the right to live independently, participate in society fully, and be free from violence and abuse. Parliament recognizes that Member States will have to take the lead in amending and enacting appropriate national legislation, but it also believes that the EU can assist in this effort by setting EU standards and creating a hub of information to which Member States can turn to for guidance.

B. Council Activity

In November 1999, the Council of the European Union ("Council") passed a resolution on the promotion of mental health in the Union. In it, the Council generally recognized the importance of mental health to quality of life, social inclusion, and economic participation. The Council established the need to cooperate with and encourage applicant member states to promote mental health throughout their societies. As an effort at direction, the Council invited the Member States to strengthen and promote policies on mental health, collect and share data on mental health with other Member States, and develop programs to promote mental health and prevent mental illnesses. And to the Commission, the Council called on it to incorporate mental health in future public health programs, produce a report on the state of mental health in the Community, and draft a proposal for a Council recommendation on mental health promotion.

The power of any legislation is dependent on its legal effect. Council resolutions are not considered a binding legal act that can be enforced in a court, as could a regulation or treaty article. However, the European Court of Justice ("ECJ") has held that a resolution is a sui generis act and, therefore, could be the subject of an annulment proceeding. In theory, this resolution

20. Id.
22. Id. at art. 8.
23. Id. at art. 14.
24. Id. at art. 15.
25. Id. at art. 16.
26. EC TREATY, supra note 4, art. 249.
could be used to annul a Community measure that contradicts it. Although this has not happened, the potential threat should persuade the Member States and Commission to act in accordance with it.

C. Recent Commission-Funded Public Health Projects

During the past few years, the Commission has grown more proactive in its efforts to protect the mentally disabled. One issue that is somewhat unique to collections of states such as the European Community is the lack of uniform standards among the Member States. In September 2000, the Commission funded a study by the Central Institute of Mental Health in Manheim to review the laws concerning the mentally disabled, such as involuntary treatment and compulsory admissions. They found a tremendous variation between the Member States. While there have been many studies on a national level, there had been few multinational studies comparing legislation of the Member States of the European Union. Unless multinational studies like this are undertaken, there would be insufficient data to harmonize legal standards for the mentally disabled among the Member States. With a solid data base, the EU can attempt to create an EU-wide standard for the protection of the mentally disabled.

Also in 2000, the Commission published a working paper focused on youth health in the European Union. The purpose of this paper was to devise public health policies for young people in the EU. It identifies psychological and psychosocial problems as "underrecognised and undertreated." For example, it is estimated that 15-20% of adolescents suffer from mental disorders, including depression, substance abuse, suicidal behavior, eating disorders, and psychotic disorders. These numbers climb even higher in underprivileged and migrant populations.

David Byrne, the Commissioner for Public Health and Consumer Protection in the European Union, has recently spoken of the Union's future plans to promote general mental health. He is committed to ensuring that mental health takes "center stage" in the development of broader public health policies. Additionally, he has stressed that while Europe may not be deficient in the care of its mentally disabled, it should make every effort to ensure that the

29. Id.
31. Id. at 28.
32. Id.
33. Id.
mentally disabled enjoy dignity and receive the necessary psychiatric care. These efforts will be critical as the Union expands its borders. Not only will the general population increase, but stress and depression are particularly likely to affect societies in transition.

In the area of public health and mental disabilities, EU policies often focus on suicide — its causes and prevention. The EU has devised Community action programs to include suicide prevention as a component of its overall public health strategy. One action program focuses on health promotion, information and training. Through it, the Commission has prioritized mental health, particularly the mental health of very young children. Another action program advocates health monitoring to provide Member States a comparative basis and other information necessary to improve their national health policies. Finally, the EU set up an action program focused on injury prevention as a means of reducing the number of suicides and suicide attempts. It too aims to collect and exchange information between Member States so that effective preventative measures can be shared.

D. Competence and Subsidiarity

Before the Treaty of Amsterdam came into effect in 1999, there was no provision on public health. Disabled people in the Union were covered only by the general citizenship language of the treaties. Yet, because the disabled did not enjoy equal rights, the European Parliament proposed that the Member States amend the treaties to include a non-discrimination clause on the grounds of disability. With a non-discrimination clause, Parliament believed that the principle of non-discrimination as it applies generally to all people would be better respected as applied to disabled persons. No such amendment has happened. The EC Treaty does have some provisions on non-discrimination, but none that target the disabled specifically. The European Court of Justice has, however, recognized a general principle of non-discrimination in EC law. While general principles of law can be powerful interpretative tools,

35. Id.
36. Id.
37. Byrne, Coping with Stress, supra note 28.
39. Id.
40. Id.
41. Id.
42. Id.
43. European Parliament Resolution, supra note 18, at ¶ E1.
44. Id.
45. Article 12 of the EC Treaty prohibits discrimination on nationality grounds; Article 34 prohibits discrimination between agricultural producers and consumers; Article 114 requires equal pay for equal work, regardless of sex.
this general principle really only prohibits Community institutions from creating arbitrary distinctions between groups, like the disabled, and those without disabilities.\textsuperscript{47} It is important to note that there is no EC Treaty provision or general principle of law that requires identical treatment of disabled and non-disabled persons.

In addition to the lack of a non-discrimination clause, there also existed an apparent lack of legal basis for Community action designed to protect the mentally disabled. Before the Treaty of Amsterdam, it was procedurally difficult for the Council to legislate for the benefit of the disabled. As discussed below, Article 308 of the EC Treaty cannot be used as a substitute legal basis where the proposed action extends beyond the boundaries of the treaties. Article 152 of the EC Treaty, as introduced by the Treaty of Amsterdam, has "given the Community new competence in public health"\textsuperscript{48} which "calls for the creation of a broad and coherent EU public health strategy with well-defined aims and priorities."\textsuperscript{49} The treaty article states that "A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities," and that "Community action . . . shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health."\textsuperscript{50} The breadth of the treaty language should ensure that the Commission, Council, European Parliament and Member States assume the responsibility to effectuate its aims.\textsuperscript{51}

While Article 152 created a new competence for the EU in the area of public health, it does not replace or usurp Member State responsibility for national action. In other words, the EU must have the competence to act and ensure that it does not violate the doctrine of subsidiarity. This is, essentially, an issue of how power should be divided between the Community and the Member States. The doctrine holds that for an EC action to be justified, the Community must establish that the proposed action cannot be adequately achieved by the Member States, and that it can be better achieved by the Community.\textsuperscript{52} In other words, if Member States can more effectively act to protect and promote the rights of the mentally disabled, the Member States should retain the power to act.\textsuperscript{53} Member States may be more effective due to their individual abilities to address the diverse economic, political and cultural cli-

\textsuperscript{47} Hartley, supra note 46.
\textsuperscript{48} Byrne, European Conference, supra note 38.
\textsuperscript{49} Byrne, Coping with Stress, supra note 28.
\textsuperscript{50} EC TREATY, supra note 2, at art. 152.
\textsuperscript{51} Byrne, European Conference, supra note 38.
\textsuperscript{52} EC TREATY, supra note 2, at art. 5.
\textsuperscript{53} Note that the doctrine of subsidiarity does not apply to areas where the EC already exercises exclusive jurisdiction. Because the EC does not have exclusive jurisdiction in the field of public health, it must, therefore, address the subsidiarity question.
mates in the Community. Or, Member States may be more effective on a purely practical basis.

In exercising its new competence, the Commission seems to be heeding subsidiarity principles. Commissioner Byrne has stated that Article 152 "places a strong emphasis on tackling health problems at the EU level . . . while respecting the responsibilities of the Member States for the organization and financing of health services." As a practical matter, the EU cannot treat the mentally disabled. The EU can, however, gather and centralize information more effectively than any individual Member State. Therefore, Article 152 and the doctrine of subsidiarity will together dictate the appropriate actor for the myriad of future legislation and programs concerning the rights of the mentally disabled in the Community.

E. Future Action under Article 152

Article 152 has an extremely broad objective. Essentially, it demands that all Community policies and activities promote a "high level of human health protection." The Commission recently adopted a comprehensive strategy that aims to achieve a "coherent and effective approach" to health issues crossing various policy issues. The strategy incorporates a public health framework which aims to set clear objectives and employ effective policy instruments. The desirability of an overall framework was prompted by, among other things, public expectations that the EC should protect the health of individuals, and anticipated challenges resulting from the EU’s imminent enlargement. While the Commission cites public health generally, much of the strategy applies to mental health issues specifically.

To meet these challenges, the public health framework devised a new Public Health Program which will handle future problems concerning mental health in the Community. The program envisages three broad areas of action. The first priority is to improve health information and knowledge by developing comprehensive health monitoring and information systems to track trends in health status and monitor key developments in health systems. Such systems will hopefully provide improved information to policy makers and health professionals so that issues like mental health can be addressed effectively. The second priority concerns the Community’s reaction time to

55. Byrne, Coping with Stress, supra note 28.
56. EC Treaty, supra note 2, at art. 152.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
health threats, like communicable diseases.\textsuperscript{63} Thirdly, the Public Health Program will address health determinants, \textit{i.e.}, the underlying causes of poor health, through preventing disease and promoting health.

The Commission seems committed to use Article 152 as a tool to protect and promote the rights of the mentally disabled. Commissioner Byrne has stated that a "high priority\textsuperscript{64}" will be to combat mental health problems and to eradicate stigmas and discrimination the mentally suffer. As Article 152 is new, its potential is unknown. The coming years will demonstrate whether the Community's ambitions can be translated into a reality for its mentally disabled citizens. The challenges are formidable, especially given the Union's scheduled enlargement.

\textbf{III. The Challenge of Enlargement}

Enlargement is governed by Article 49 of the Treaty on European Union. It limits the right to apply for European Union membership to those states that respect the principles of fundamental human rights, which include the fundamental human rights guaranteed by the European Convention on Human Rights and the constitutional traditions of the Member States.\textsuperscript{65} Hungary applied to join the European Union on March 31, 1994. At a summit in Copenhagen scheduled for December 2002, the EU plans to close negotiations with 10 applicant states, including Hungary, so that full membership can be in place by 2004.\textsuperscript{66} Before that time, Hungary must (1) adopt the Union's \textit{acquis communautaire} and (2) harmonize its existing national legislation to be consistent with EU legislation. Hungary is already well on its way to achieving both of these conditions. A brief review of the Hungary's enlargement process shows that human rights are critical to an applicant's accession. Even if the rights of the mentally disabled are not discussed specifically, the disabled will, at a minimum, have the same rights as non-disabled members of the EU. Of course, this is all conjecture at the moment. In several years the benefits of EU membership to Hungary's mentally disabled will emerge.

\textbf{A. Hungary's Pre-Accession Strategy and Europe Agreement}

The pre-accession process generally includes financial assistance, an Accession Partnership agreement, limited participation in existing EC programs, and a detailed study of the \textit{acquis communautaire}.\textsuperscript{67} Accession Partnerships are the main pre-accession strategy instrument, as they mandate regular reports that in turn set short and medium-term priorities that become part of the acces-

\begin{itemize}
  \item \textsuperscript{63} \textit{Id.}
  \item \textsuperscript{64} Byrne, Coping with Stress, \textit{supra} note 28.
  \item \textsuperscript{65} TEU, \textit{supra} note 2, at arts. 6 & 49.
  \item \textsuperscript{66} Verheugen, \textit{supra} note 5.
\end{itemize}
sion criteria. Hungary's current Accession Partnership agreement was adopted in December 1999. Its medium term goals include programs concerning the Roma, such as integration and anti-discrimination efforts in the fields of education, culture, employment, housing, health, and social services.

The Europe Agreement is a framework for assessing the applicant's adoption of the *acquis communautaire* and implementation of the Accession Partnership agreement. In June 2000, Hungary proceeded to the second stage of negotiations, making it the first of the associated central and eastern European countries to do so. In its Europe Agreement, the approximation of laws is deemed a "major precondition" for Hungary's economic integration. This means that Hungary's future and existing legislation must be consistent with the European Union's. All of Hungary's laws must be approximated to the EU's laws, including the existing EU legislation protecting the disabled, as discussed above.

**B. Hungary's Progress**

Each applicant country undergoes regular scrutiny throughout its accession process. At meetings in Copenhagen in 1993 and Spain in 1995, the Council devised criteria, now known as the Copenhagen Criteria, with which the Commission could fairly assess the progress of each applicant. The Copenhagen Council stated that, "membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for the protection of minorities." This language is very similar to Article 6 of the Treaty on European Union which states that the "Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law . . . ." In a 1999 progress report, the Commission concluded that all the applicant countries, including Hungary, had met the political criteria of the accession process, even though problems still existed concerning promotion of human rights and protection of minorities.

Criteria for EU membership are also reviewed via regular reports conducted by the Commission. In a 1999 regular report, the Commission found

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68. *Id.*
69. *Id.*
74. *Id.*
75. TEU, *supra* note 2, at art. 6.
that while Hungary fulfilled the political elements of the Copenhagen criteria, it still needed to improve its protections of the Roma’s human rights, as well as tackle remaining bastions of corruption.\textsuperscript{77} By the year 2000, Hungary had apparently resolved these deficiencies. The Commission found that “Hungary has achieved stability of institutions guaranteeing democracy and the rule of law,”\textsuperscript{78} which included the Parliament, the executive, the judiciary, and anti-corruption measures. Additionally, the Commission found that “Hungary has continued to respect human rights and freedoms” as evidenced by its accession to “most of the major human rights instruments.”\textsuperscript{79}

\section*{C. Anticipating the Challenges}

The European Parliament and Commission have been diligent in striving to flag and address problems in the area of public health that are likely to arise due to the EU’s rapid enlargement. In September 2000, the Parliament issued a resolution about the likely effect of enlargement on public health and consumer protection.\textsuperscript{80} Parliament noted that psychiatric abuses under Communist systems in applicant countries will necessitate extensive reform in many applicant countries.\textsuperscript{81} In the area of public health, Parliament called on the Commission to include the World Health Organization in its evaluation of mental health reforms in candidate countries.\textsuperscript{82} Additionally, the Parliament suggested that PHARE, which is the primary program for financial assistance to Hungary and other applicant countries, be more proactive in the public health field.\textsuperscript{83} Parliament also suggested that applicant countries be advised of the new \textit{acquis communautaire} that is likely to spring from Article 152’s mandate.\textsuperscript{84} It is not enough that the applicant countries adopt and approximate existing EU legislation. They must also be aware of, and even consulted in, the planning phases of new legislation that affects public health, like the provisions targeting the mentally disabled.\textsuperscript{85}

In a working paper, the Commission concluded that the overall health care systems in the applicant countries were inferior to those in the EU.\textsuperscript{86}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{77} 2000 Regular Report from the Commission on Hungary’s Progress toward Accession, 13 (Nov. 8, 2000), \textit{available at} http://www.europa.eu.int/comm/enlargement/report_11_00/index.htm.
\item\textsuperscript{78} \textit{ld.}
\item\textsuperscript{79} \textit{ld.} at 17. \textit{See also id.} at 92 (complete list of the human rights instruments to which Hungary has succeeded).
\item\textsuperscript{81} \textit{ld.}
\item\textsuperscript{82} \textit{ld.}
\item\textsuperscript{83} \textit{ld.}
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Furthermore, the general level of the population’s health is lower in the applicant countries than in the Union. If the enlargement process stays on schedule, ten applicant states will join the Union in 2004. Therefore, the overall level of health in the EU will drop unless some of the deficiencies in the applicants’ health systems can be rectified, or at least addressed, ahead of time. The Accession Partnerships are designed to bring applicant countries to a level of footing equal to the European Union. The further along the applicants are in the approximation and adoption of the *acquis communautaire*, the stronger the chance that health conditions for their mentally disabled will improve.

**IV. The Role of EU Human Rights Law in Protecting the Mentally Disabled**

As an applicant country and as a future member of the European Union, Hungary must respect the EU’s positions on human rights. This obligation is independent of the obligation to adopt the *acquis communautaire* and harmonize national laws, as discussed above. Human rights in the EU is a more general concept. One might invoke EU human rights law by arguing that a national law, or even an EU law, concerning the mentally disabled violated EU notions of human rights. It is, therefore, important to understand how human rights law can be used as a lens through which to view the legality of laws affecting the rights of individuals, particularly the mentally disabled.

**A. Human Rights under European Community Law**

Law promoting and protecting human rights in the Community developed gradually as EC law evolved. The European Community Treaty has broad objectives, most of which are economic in nature. Originally, there were no provisions for the protection of human rights. The concept came to light through the case law of the European Court of Justice which developed the notions of fundamental human rights as a general principle of law. In 1979, and then again in 1990, the Commission proposed that the EC formally adhere to the European Convention on Human Rights. The Court rejected this effort, holding that such action would require a treaty amendment, as human rights activity fell outside the parameters of the Community’s conferred powers.

This holding is important for human rights advocates because the Court drew very firm boundaries of acceptable EC activity. Although the European Court of Justice recognized human rights as a general principle of law, it held that the EC lacked competence to accede to the Convention, as the subject matter was outside the scope of the power conferred by the treaties. While general

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90. *Id.*
principles may be used either as an interpretative tool or as the basis for striking down an act, they may not alone be the legal basis for an EC act. 91

To this day, after numerous amendments, the EC Treaty still does not list the protection of human rights as one of its express objectives, nor are there specific provisions on human rights. Thus, human rights activity is still outside the area of the Community's conferred powers, providing a stark reminder of the Community's original economic purpose. The only clause that arguably provides some legal basis for tangential human rights activity is Article 177 which governs development cooperation between the EC and third countries. The article states that "Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms." 92 This slight move toward human rights protection may signal the beginnings of a transition from a purely economic body to a political one. The reality remains, however, that the EC Treaty falls short of a foundation for Community human rights activity. As a practical matter, therefore, it is much better not to have to rely on general principles of human rights law, unless only the validity of an EC or Member State action is being challenged. In other words, competence for a direct human rights act is, as yet, non-existent under EC law.

B. Better Protection under the Treaty on European Union

The Treaty on European Union, ratified by the Member States in 1992, was the first Community treaty to expressly protect fundamental human rights. The common provisions of the Treaty on European Union (articles 1 – 7) apply to all three pillars. Article 6(1) states that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law . . . ." 93 While this language is sweeping and seemingly strong, its effectiveness is diminished because the clause is non-justiciable. 94

However, the Union does preserve its credibility and commitment to human rights advancement by including another justiciable clause, 95 thereby giving teeth to its conviction. Article 6(2) of the Treaty on European Union states that, "the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law." This clause

92. EC TREATY, supra note 2, at art. 177.
93. TEU, supra note 2, at art. 6(1).
95. TEU, supra note 2, at art. 46(d).
gives the power to enforce human rights in the EC on a broad scale. Because human rights protection takes the form of a general principle of law in the Community, it is essentially judge-made law. It is hard to define, and therefore, difficult to enforce. However, the inclusion of a human rights clause in the Treaty on European Union is a clear signal from the Member States that the subject matter is important and deserving of constant attention.

The Treaty on European Union also provides for the control of a Member State that flouts human rights laws. If a Member State seriously and persistently violates the principles of fundamental rights, the Council may suspend certain membership rights, including the right to vote on the Council. The amendments introduced by the Treaty of Nice, which is now in the process of Member State ratification, supplements this procedure with a preventative measure that allows the Parliament, Commission or Council to declare that a Member State is clearly in danger of violating human rights. The complaining party may then address to the offending Member State resolutions to end the violation. With this new provision, a Member State that abuses the human rights of mentally disabled persons will, in theory, be kept in line by the other Member States, or lose crucial voting rights on the Council.

The treaty provisions concerning the Second Pillar, i.e., the Common Foreign and Security Policy of the European Union, touch on human rights promotion and protection. Article 11 defines one of the Common Foreign and Security Policy objectives as being "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms." This is, obviously, geared toward a foreign policy context, and it seems unlikely that it would used to affect human rights law in the Community. However, one need only remember the atrocities of Nazi Germany and its systematic elimination of those it deemed sub-human, including the mentally disabled. It is not inconceivable that one could define such abuses, and indeed lesser degrees of inhumanity, as a component of foreign security policy. This clause, while seemingly ineffective in its apparent lack of application, could deter recurrent horrors.

C. The Advent of the Charter of Fundamental Human Rights

While discussing methods of promoting and protecting human rights of the mentally disabled, it is important to know exactly what rights are able to be protected. There is no comprehensive list of human rights for the general population in European Union law, or for the mentally disabled specifically. Until recently, the EU simply had not defined what human rights are. There was no...

96. Id. at art. 7.
98. Id.
99. TEU, supra note 2, at art. 11.
definitive list — only the case law of the European Court of Justice and the principles common to the Member States. The spectrum of rights evolved over time and now ranges from the protection of the physical body, such as freedom from torture, to basic economic rights, like the right to earn a living\textsuperscript{100} and to have one's name withheld from a butter coupon.\textsuperscript{101}

Recently, new ground was broken when the Member States signed the Charter of the Fundamental Rights of the European Union (Charter).\textsuperscript{102} The Charter sets out civil, political, economic and social rights of European citizens under the headings of dignity, freedom, equality, solidarity, citizens' rights, and justice. These rights are based on those protected by the European Convention on Human Rights and on the constitutional traditions of the Member States.\textsuperscript{103} The document reflects a clear desire to "strengthen" the protection of fundamental rights and to make those rights more "visible."\textsuperscript{104} The Charter applies to all citizens, but there are some rights that are particularly relevant to the mentally disabled, especially those living in institutions. These rights include the right to dignity,\textsuperscript{105} the right to integrity of the person,\textsuperscript{106} prohibition of torture and inhuman or degrading treatment or punishment,\textsuperscript{107} the right to liberty and security,\textsuperscript{108} respect for family and private life,\textsuperscript{109} freedom from discrimination on the basis of disability,\textsuperscript{110} the right to preventative health care and medical treatments,\textsuperscript{111} and the right to live as an integrated member of society.\textsuperscript{112}

This Charter represents a huge step forward for human rights law in the European Union. As yet, its impact is unknown, but its prospects are a bit dim in the legal sphere. In other words, in its current form it cannot serve as the legal basis for future legislation. It does not fill in the procedural hole identified in Opinion 2/94, as discussed above. The very text of the document states, "This Charter does not establish any new power or task for the Community or Union, or modify powers and tasks defined by the Treaties."\textsuperscript{113} However, the legal status of the Charter, or lack thereof, does not concern the Commission. Taking an optimistic stance, the Commission stated that "[it] is convinced that the value added by the draft is real and that this value added is the basis for the future success of the Charter, irrespective of its ultimate legal

\textsuperscript{100} Case 44/79, Hauer v. Land Rheinland-Pfalz, 1979 E.C.R. 3727.
\textsuperscript{101} Stauder, \textit{supra} note 88, at 424.
\textsuperscript{102} Charter of the Fundamental Rights of the European Union, 364/01 O.J. 2000.
\textsuperscript{103} \textit{Id.} at 8.
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.} at art. 1.
\textsuperscript{106} \textit{Id.} at art. 3.
\textsuperscript{107} \textit{Id.} at art. 4.
\textsuperscript{108} \textit{Id.} at art. 6.
\textsuperscript{109} \textit{Id.} at art. 7.
\textsuperscript{110} \textit{Id.} at art. 21.
\textsuperscript{111} \textit{Id.} at art. 35.
\textsuperscript{112} \textit{Id.} at art. 26.
\textsuperscript{113} \textit{Id.} at art. 51.
nature." In fact, the Commission believes that public support of the Charter will be so high that it will eventually be incorporated into the treaties. The Council has also considered the idea of integrating the Charter into the treaties, although less emphatically than the Commission. If the Charter were incorporated into the treaties, it would likely provide a more solid basis for future EU legislation in the human rights arena.

Even with the benefit of the new Charter of Fundamental Human Rights, the exact rights of the mentally disabled under EU law are still unclear. There is much debate over whether "mental health" is a definitive human right. However, when Hungary and the other applicant states join the EU, they will be subject to these laws. The ground is vague and uncharted, but the framework to curb abuse and enforce sanctions exists, albeit in nascent stages.

V. THE EUROPEAN CONVENTION ON HUMAN RIGHTS — A MODEL TO CONSIDER

Since its inception, the Council of Europe has focused on human rights protection. More than 50 years ago, it created the European Convention on Human Rights ("Convention") and soon after created the European Court on Human Rights to enforce those rights. All of the EU Member States are also members of the Council of Europe. Their functions today are different due to their beginnings. The EU started as an economic organization, and is now approaching the field of human rights, while the Council of Europe always ranked human rights as a primary issue. It is, therefore, instructive for the Union to consider the Council of Europe’s experience with the Convention.

Through the European Convention on Human Rights, the Council of Europe has been highly successful in protecting human rights in Europe. Any individual from a member state of the Council of Europe may file a complaint against their own government for an alleged human rights violation. The system has been so efficient and effective in large part due to the member states’ willingness to respect the process and resulting decisions. The Council of Europe clearly has greater adjudicative power in the field of human rights than does the European Union.

The Convention addresses human rights on both general and specific levels. As applied to the mentally disabled, the concept of human rights means that they should be treated humanely and with the same dignity and
respect due all persons.\textsuperscript{122} While the civil and political rights outlined by the Convention include fundamental rights, like the right to life,\textsuperscript{123} freedom from torture or inhuman and degrading treatment or punishment,\textsuperscript{124} right to liberty and security of person,\textsuperscript{125} freedom of thought and expression,\textsuperscript{126} etc., it does not explicitly provide for the positive "right to mental health" like entitlements to services and treatment.\textsuperscript{127} Rather, the European Court on Human Rights has mostly defended a set of negative rights to privacy, liberty and autonomy.\textsuperscript{128} This criticism is mild compared to the criticisms the EU receives for so severely limiting its scope on human rights issues.\textsuperscript{129}

As a member of the Council of Europe, and as a signatory to the European Convention on Human Rights, Hungary has consequential rights and obligations.\textsuperscript{130} And, when Hungary joins the European Union, it will have a separate and justiciable obligation as an EU Member State to respect the Convention’s provisions.\textsuperscript{131} As discussed above, the EC was unable to accede to the Convention because it lacked the legal basis to do so. However, in the Treaty on European Union, the Member States specifically cite the Convention as the defining source of fundamental human rights to be honored by the Member States. It is, therefore, logical for the Member States to apply their obligations to the Council of Europe to their activity in the European Union.

\textbf{VI. Conclusion}

The use of European Union law as an effective tool for the disabled is a work in progress. Currently there are better venues, like the Council of Europe’s European Court on Human Rights, before which individuals can bring claims of human rights violations. But, the Union is constantly evolving and trying to increase its powers. One could conclude that the European Court of Justice in its Opinion 2/94 issued a clear indication that human rights issues are better handled by the Council of Europe. Yet, the Treaty on European Union illustrates that there is a desire in the EU to increase its involvement in the human rights arena. By creating the Charter of Fundamental Human Rights, the EU demonstrated that it must recognize and protect human rights if it is going to be embraced by the European public as it continues to enlarge. Simply put, a change in attitude may lead to a change in action. As the EC Commissioner for Public Health stated, “[p]romoting mental health, and fight-

\begin{itemize}
\item \textsuperscript{122} Wachenfeld, \textit{supra} note 9, at 117.
\item \textsuperscript{123} Council of Europe, European Convention on Human Rights, Nov. 4, 1950, signed in Rome, E.T.S. No. 5, at art. 2.
\item \textsuperscript{124} \textit{ld.} at art. 3
\item \textsuperscript{125} \textit{ld.} at art. 5
\item \textsuperscript{126} \textit{ld.} at arts. 9 & 10.
\item \textsuperscript{127} Gostin, \textit{supra} note 94, at 158.
\item \textsuperscript{128} \textit{ld.}
\item \textsuperscript{129} \textit{See} discussion of Opinion 2/94 \textit{infra} Part IV.C.
\item \textsuperscript{130} It is beyond the scope of this article to address these obligations.
\item \textsuperscript{131} TEU, \textit{supra} note 2, at art. 6 (2).
\end{itemize}
ing mental health problems, together with the stigma and discrimination attached for those coping with mental disorders, will remain a priority on the public health agenda for the European Commission . . . .”

If these words find an outlet for action, the human rights of the mentally disabled in Hungary, and indeed throughout the whole EU, could improve drastically.

132. Byrne, Address, *supra* note 34.