EuroMed and Fundamental Human Rights Protection through the European Convention of 1950. An Idea to Be Pursued?

Peter G. Xuereb*

Introduction

This paper argues that the European Union's own internal experience with the protection of human rights across the member states – in a context of loyal co-operation towards defined ends – has much to offer in contemplation in order to take forward the human rights agenda (but also the wider democratic as well as economic and social agenda) for the EuroMed region, an agenda shared or to be shared by the peoples of the Union and the peoples of the Mediterranean. In particular, it follows the hypothesis that for human rights protection to be a reality, individual enforcement is key, and so individuals must in practice enjoy real access to courts at the national level but then also have final recourse to an «outside» tribunal which will independently and through practical dialogue apply universal norms, thus controlling all «domestic» institutions by ultimately keeping them within the bounds of what is universally acceptable.

Another dimension is crucial. This is to be found in many regions of the world, and in Europe can be seen in the European Union (EU) system, within the role of the Court of Justice of the European Union (CoJ), and is a function performed also by the European Court of Human Rights in Strasbourg (ECtHR). It is the harmonised interpretation of the universal human rights documents at play. In the cases of the Court of Justice and the ECtHR, these courts can both be said to operate by reference ultimately to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, to which the European Union is about to accede formally. In the case of the CoJ, first reference will be to general principles of European law, drawn also from the constitutional traditions common to the member states and to the Charter of Fundamental Rights of

** This is the text of a seminar paper delivered by the author during a four week sabbatical research and teaching visit at the Centre for Human Rights of the University of Padua in October of 2012. The author wishes to thank the Professors, staff and students of the Centre for a most stimulating and happy experience. The author is Professor of European and Comparative Law at the University of Malta.*

the EU («the Charter») – which document expresses the universal but to some degree also the particular European Union heritage in terms of balance between the interests of the individual and those of the community (the «individual» and the «social»).

1. The Mediterranean

I argue strongly that a «system» is needed for the Mediterranean Partner states of the Union and their citizens, indeed for the EuroMed region acting in ever closer collaboration, which can serve the same purposes for each state and people in the region. At a time when new constitutions are being considered and developed in the Mediterranean area, this paper posits that EuroMed cooperation against a human rights backdrop is best done through a system that makes each of these states a part of the whole and that incorporates the input of non-state actors in the process. This input could take the form of participation in the framing not only of new national constitutions, but also in a broader context of adopting a common document of universal rights. Furthermore, whatever systems of recourse or redress are put in place the right of recourse should be available to individuals (individual-based) while recognising the protective roles of groups and organisations. The two objectives of (1) individual access to justice both at national and international level and of (2) harmony with the universal system, are needed. In my view, both objectives are achievable only by clear binding constitutional reference to some/a «universal human rights document», even if then one would envisage, in the resolution of particular cases, the employment of the dialogical system of adjudication or mediation of values and rights that is implicit, for example, in the «European» systems. To give the main example, national constitutional courts are in constant dialogue through particular sets of proceedings with the European Court of Human Rights or the Court of Justice of the European Union, as the case may be, through the various mechanisms that exist for this. These have been identified as clearly multi-level systems. As Paolo De Stefani has emphasized in relation to the judicial role: «The contribution of the judiciary to multi-level governance can hardly be overestimated; the interplay, the dialogue, and sometimes conflict between the EU Member

States' national courts and the European Court of Justice have greatly contributed to the development of the EU's institutional framework as a sui generis type of international organisation and of EU legislation as it stands today». Indeed for him, individuals and groups can use the judicial system to bypass other political institutions in order to get movement on legislative and other initiatives where progress appears blocked through the normal political processes. I do not suggest that this is a main aim for advocating similar for the EuroMed process, but surely it is a consideration.

Whatever the merits on the full governance side, this phenomenon of judicial evolution of the law has certainly been the experience in Europe, and not least with human rights protection in the EU context. Will something similar work for the Mediterranean? Of course no one wishes to see the politicisation of the courts. But judicial multi-levelism is an increasing factor world-wide and part of globalisation. In any case, independently of such arguments as relate to the pursuit of political agendas, I think that it is clear, firstly, that there can be no real effectiveness for human rights protection without multi-level dialogue and supervision. Secondly, I also think that it is clear that human rights documents will remain a dead letter without proper and full access for the victim to judicial remedies in practice. Thirdly, there will be far less harmonious pursuit of universal values and rights than there will be with some tight link, some strong bridge, to such universal values through a «coordinating» court. The last function is served in the context of EU member states *qua* member states first by the Court of Justice and then (and this will be the case shortly also for the Union itself) by the European Court of Human Rights in Strasbourg.

2. The EU Sphere «Post-Lisbon»

As indicated above, the Lisbon Treaty, through its revisions of the Treaty on the European Union, the new Treaty on the Functioning of the European Union, as well as the granting of legal force to the Charter of Fundamental Rights of the European Union and the undertaking on the part of the Union to accede to the European Convention (ECHR), has proceeded

to add to the multi-level – including «judicial» – dimension of the wide European regime of human rights protection. At least two new levels have been added to that already existing. The Charter of Fundamental Rights of the European Union has become binding and therefore a new official level. And the European Convention will be acceded to by the Union, which now has clear legal personality and the competence to so accede. When this happens, the «upper storey» of the multi-levelism will have been put in place, the «lower» storey being the enhanced national level for each member state. Commonality in *acquis* terms truly begins in judicial terms at the level of the Court of Justice, to be perfected in observance of human rights terms at the level of the European Court of Human Rights as necessary according to an even more universal conception to be elaborated at that level.

At the national level lie the national courts, including the constitutional courts, varying in terms of organisation at that level by member state, but typically involving a first instance court and a constitutional court, and applying the national constitution and human rights provisions as well as the international universal human rights documents to which the state has subscribed. The domestic human rights law is applied in synchrony with the international obligations of the member state in the field, and therefore – for the member states of the Union – in line with EU law (previously primarily the case law of the Court of Justice relating to General Principles of Union law and the European Convention, but not solely) and now including the Charter as interpreted by that court in addition to the other sources. This obligation on the member state courts, accepted in the national legal orders as a self-imposed auto-limitation, to aim for synchronous or convergent interpretation of Union law and national law which is inherent in the Union legal order, that is to interpret national law in line with Union law, makes for a large measure of synchrony at least in matters covered by the Union *acquis*. Surely, the EuroMed *acquis* is in need of similar synchrony.

As to the scope of operation of human rights, it is clear that the Charter of Fundamental Rights, and the granting of binding force to this document, was the direct response and counterweight to the introduction of majoritarianism (majority voting in the Council) in the field of justice and home affairs

cooperation. It is particularly where a member state can be outvoted on any particular matter by a majority of other states that its citizens should receive the same human rights protection as would always be expected and afforded when law in that area was theretofore being made by the organs of their state acting alone. Of course, the Charter extends much more widely than this across the whole field of the *acquis* of the Union, when being applied by the Union institutions or by the member states, that is when the latter are implementing Union law.

The purpose served by «human rights protection documents» in the EU is therefore the same as for national human rights documents, namely the limitation or moderation of public power and at the same time the creation of structures to afford and ensure this protection. In the case of the EU, the grant of legal force to the Charter, hand in hand with the «communitarisation» of justice and home affairs (especially in criminal matters) meant that the Court of Justice had to be made clearly competent to annul acts that violated human rights and this at the suit of the individual, as is the constitutional tradition in all member states. Human rights are individual rights that call for an individual remedy before the courts and most importantly before a constitutional court. The source of those rights is typically a constitution safeguarded ultimately by a constitutional court duly set up for the purpose of ensuring the observance of the constitution. The lack of such in theory and in practice is a fatal lacuna in human rights protection in any state which does not provide for it.

For all these reasons, the Charter is a fundamental building block in the construction of the «multilevel Europe», i.e. the «multilevel construction» of the Union of today and tomorrow. As has been mooted above, the Charter is a direct response to the communitarisation of justice and home affairs policy-making. For Ingolf Pernice, who spells this out, it is a response to the spreading of the rule of primacy of Union law, which is another way of putting it. For once Union law is validly adopted of course it takes primacy over all national law «under the conditions laid down by the case law of the Court of Justice», including over the constitutions of the member states and cannot be attacked at national level even in virtue of those constitutions, as Declaration 17 attached to the Lisbon Treaty has made clear. For the EU, in Pernice's words, it is «crucial for the citizens of

the EU to see the EU as being subject to a common catalogue of fundamental rights, providing for effective protection of their individual rights and freedoms at European level – that means against threats originating from the European Union». Even so, in my view it is possible and legitimate – in order to render the very spirit of the concept of universality in dialogue – to use not always the language of «primacy» but also that of coherence and harmony, that is to say that the multi-level approach leads, through dialogue, to a result in which all can share and to which all can lay claim.

3. The EuroMed Context

If these are the reasons for human rights entrenchment via a common – shared – document with legal force and via a jurisdiction for two courts, the Court of Justice and at the same time the European Court of Human Rights, do the same considerations not also apply to the citizens of our Mediterranean partners – and our citizens – when «operating» within the EuroMed *acquis*? Should we not engage in serious dialogue about this form of structure in anticipation of a time when the same considerations will in reality apply to the position of the individual citizen – be he or she such of a Mediterranean partner state or of a member state of the Union – who finds himself or herself affected by the Euro-Mediterranean *acquis*? Another way of asking the question is to ask whether we cannot foresee multi-levelism of human rights protection taking hold across the EuroMed region and operating as a major contributing factor to stability, prosperity, justice and peace across the EuroMediterranean region. In a globalising world, there is surely no alternative to «managing» the human rights dimension of the interface between the national, the regional and the global. This is important not only in direct protection of the EU citizen and of the Mediterranean partner citizen in his or her home state but also that of the Union and Med partner citizen in each other's states as all of us go about living and operating the EuroMed *acquis*.

4. A Common EuroMed Human Rights Document?

This question does not conceal any attempt to set out to create an empire. Even the European Union has not done this for itself (some cynics say «yet!»), and certainly the peoples of Europe have so far rejected a European «Constitution». For this reason, it may indeed be possible to advance the Charter of Fundamental Rights of the EU as a proposed common Charter for the EuroMed region. As I understand it, it is for this reason that Ingolf Pernice has argued that there will be no constitutional significance in the deep (hegemonic) sense if the Charter were to be proposed for adoption as the model human rights document or instrument of reference for the wider world, however constitutionally significant it may in reality turn out to be for the member states of the Union themselves. If the Charter is a good «model» for adoption «world-wide», commended mainly by its balance between liberal rights and solidarity, then could it be a candidate for the place of EuroMed HR document? On this politically neutral view, the question of the adoption of the Charter as the binding human rights document for EuroMed is open for real discussion.

What is clear, or seems clear at least to me, is that *some* common human rights binding document of reference is needed. The Barcelona Declaration is a pure declaration, not binding in itself and not drafted as such. At the moment, the Union and its member states are governed by the documents referred to earlier (national constitutions, the EU Charter and the European Convention, the last one shortly to operate from both national and Union directions). The Mediterranean partner states, operating bilaterally with the Union, are governed by their law and disparate other international documents which can range from the European Convention (very few) to the Universal Declaration of Human Rights and the African or Arab Charters of Human Rights and beyond. But closer definition and elaboration is required. And of course, whatever reference may or may not happen to human rights documents, reference is not «common» to the EuroMed partners in matters of sole concern to them. The options: pick one document, or dialogue about merging a number of documents, or stay as we are. The point of this paper excludes the third option and prefers the first option as the fastest and, in my view, now possible route (after

the Arab Spring) towards a universal set of rights founded on the Universal Declaration and a machinery that will work to further unite us.

5. A Common EuroMed Human Rights Machinery?

We (in the Union) should at least ask ourselves and open for discussion with our partners whether it is a real option to consider: (1) the Union Charter being used as the common document, (2) the CoJ being used as the «harmonising» and authoritative court on human rights in the context of implementation of the EuroMed *acquis*, (3) adopting or adapting the judicial mechanisms, such as the preliminary reference procedure, to be found in the Treaty on the Functioning of the European Union (TFEU) to the imperatives of common interpretation and application of human rights provisions in the EuroMed region. It is at least arguable that the considerations that went into the devising of a common frame of binding reference for the Union remain the same for the EuroMed *from the Union's perspective*. The Union, one presumes, does not intend to operate differently depending on the citizen's state of provenance or place of operation. Nor, one might argue, do the Mediterranean partner states expect that anything else be the case. Legal certainty is most important here, and even more so is coherence, «single standard» (as opposed to «double standards») behaviour and the credibility of the Union. The Union is expected to be consistent, by its citizens and by the wider world. In sum, also from the Union perspective, the Union must not only be, but must appear to be, perfectly consistent in its approach on human rights and fundamental freedoms, both internally and externally. From the Union's perspective this is most easily achieved if the Union system is shared to the greatest possible degree by its partners, but so much is simply to state the obvious. Thinking along these lines, while the EU Charter and the annexed «Explanations» form one whole, the question would be whether the Charter and the Explanations can be accepted as such by the Mediterranean partner states. If for some reason the answer is definitely in the negative, and it were concluded that there would need to be a EuroMed Charter with a EuroMed version of the Explanations, then the «rupture» in internal and external consistency for the

Union would need to be justified by the Union towards its citizens.

There is another point. Even in the Union, it has been said, notwithstanding the Charter and accompanying Explanations, the remedial judicial infrastructure is not complete, for the citizen cannot access the Court of Justice directly with «constitutional» complaints. An «individual» and «direct» «interest» is as a rule required before an individual can bring a direct action, and these are terms of art that considerably restrict the right of direct action before the Court of Justice. Although the citizen has almost full protection before the Court of Justice then, there will be cases where it is still vital that there be a synchronous interpretation and application of the Charter by each and every national member state court.

Completing the multi-levelism of the EuroMed construct – in the sense of dialogue for an HR regime for the EuroMed region – would mean simultaneously: (1) developing full access to justice at Mediterranean partner state level (for each to do as a matter of its constitutional law), and (2) either (a) developing access to the system of judicial dialogue developed within the Union (with the Court of Justice at the centre) and/or (b) creating a new such «Mediating/Coordinating» Court (EuroMed Court) and/or (c) possibly bridging also with the European Court of Human Rights in Strasbourg.

All of such elements put together would complete a model of synchrony for the entire EuroMed area. The aim – and hopefully effect – would be essential consistency between Union *acquis* and EuroMed *acquis* with the intermediation also of the «Strasbourg *acquis*».

There would be a large measure of uniformity of human rights interpretation «internally» for the Union (meaning Union and each and all member state(s)) and externally in the Union's and member states' application of human rights along with the Mediterranean neighbours. There would be synchrony in application between the member state courts and the Court of Justice and on the other hand the Med partner state courts and the European Court of Human Rights.

On the other hand, if any essential element went missing, that is, if we got:

(1) No common binding document or understanding as to sources;

(2) No multi-level judicial dialogue – absent mediation according to agreed Explanations;
(3) No or insufficient guarantee by each party of the provision of remedies sufficient to ensure effective legal protection (in the way that Article 19 of the TEU obliges member states to provide),
then the results in terms of application and enforcement would fall short of what might be considered the ideal.
It is surely worth recalling that accession of the Union to the ECHR will have a key result. It will make the European Court of Human Rights in Strasbourg the single final authority in the field of human rights in Europe, also for the Union itself. For this reason, perhaps the single most important question for EuroMed human rights is how feasible it be that all or the majority of Med partner states might see their way to subscribing to the European Convention of 1950. Ruling out accession to the Convention by the Mediterranean partner states would not bode well for harmony of HR protection across the EuroMed area. This may well be the absolutely KEY step that is required.

6. A Multilateral Approach Needed

For all of these elements to be put in place to an ideal standard, it seems most desirable as well as necessary that a multilateral approach be taken. The dialogues that would go into discussing a common document and any accompanying «explanatory» document in this way, as well as the subject of a possible multi-level judicial architecture, would of themselves lead to a measure of convergence and mutual understanding that will inspire certainty and faith in any eventual system to be put in place. One would also expect clauses to be agreed that reflect the kind of multilevel dialogue that will occur at the judicial level, such as – for example – those contained in Articles 51 and 52 of the Charter (rights resulting from constitutional traditions to be interpreted in the light of those traditions and full account to be taken of national law and practices as specified). Moreover, as provided by Article 52(7) of the Charter for the purposes of the Union Charter, the «Explanations» drawn up to provide guidance in the interpretation of «the» HR document would need to be given due regard by all courts involved – those of the Union and of each EuroMed state.

If human rights law and the related enforcement machinery are about citizen rights and citizen protection, then the EuroMed's priority should be about assisting and ensuring thereby that each national legal and judicial order is able to conduct a proper human rights review of national action and national legislation implementing Union law, as well as of raising issues of legality of EuroMed law itself. It is the position in the Union, even after Lisbon, that the primary role and responsibility for the protection of the individual lies with the national courts. Indeed, it applies to the national legislatures in the first place. Thus, new Article 19(1) of the TEU now expressly provides that the member states shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Surely this has been sufficiently explicit, also from the side of the partner state, in each and every human rights clause, in each and every bilateral agreement entered into by the Union with its partners. The point is making it count.

However, it has been said on the question of the setting up of a parallel EuroMed (human rights) Court, that the Court of Justice has historically been rather averse to the idea of separate new courts being set up which might come to different interpretations of international agreements to which the Union was a party. By the same token, it is not a forgone conclusion either that the Med partner states would accept the jurisdiction of the Court of Justice in its composition as Union Court – if this were in any way offered. There may be no alternative to a new EuroMed Court properly composed if we are to get the rule of law – and especially individual human rights enforcement – in the Med partner states and across the EuroMed area.

7. The «Strasbourg Court» – The European Court of Human Rights

As for assigning the key adjudicatory «coordinating» role, via general accession to the Council of Europe's European Convention by all EuroMed states, to the Court of Human Rights in Strasbourg, all depends precisely on such accession by the Med partner states to the European Convention.

And we can ask: do the same reasons apply to the Med states and to the EuroMed that (1) required any prospective Union

member state to ratify the European Convention, and (2) that rendered it insufficient for the Union to be bound even by a binding Union Charter, but indeed required it also to accede to the European Convention?

It is not currently or foreseeably proposed that EuroMed be reified as a separate entity from the Union and the Med partner states as bound bilaterally; therefore the question of separate legal personality does not arise. In any case, the acts implementing any agreements between them remain those of the participating states and/or of the Union. On that score what matters is that there be mechanisms for individual access to a remedy against the Union and against each EuroMed state, as necessary. However, it is a question whether a multilateral approach will work best, and the strongest argument for this is that a multilateral approach to human rights, as opposed to a bilateral one, is surely the preferred way to achieve closer integration of values, while respecting essential difference, as the experience of the Council of Europe has shown.

Conclusion

As to «bolstering» the remedies available in any country party to any human rights agreement, the ideal mechanism would be one which led to eventual annulment of all acts in breach and damages if so indicated, namely a real remedy. So far, this has been lacking in EuroMed. As to the question of the common interpretation of a common human rights document, the point is that any authoritative interpretation of any provision in such a document should be a commonly or generally acceptable one, as well as the proper one. It is difficult, but not impossible, to envisage a link or bridge being created to the Court of Justice of the Union. One alternative would be to create a new «EuroMed» Court – just for human rights determinations? – for the purpose of giving a «last (domestic) resort» ruling within the terms of the European Convention, in accordance with similar procedures to those in the TFEU. From there, the matter could be taken to the (separate) European Court of Human Rights in Strasbourg, if this latter idea was widely adopted.

In any event, now that the EU itself acknowledges the final say of the ECtHR, it is arguable that a final recourse to the

ECtHR in Strasbourg should happen irrespective of the origin or source of a human rights issue affecting an agreement or its implementation. All this is a further reason for a multilateral framework treaty, or at least a multilateral framework Charter of Human Rights, with the bilaterals entered into between the Union and the third state dealing essentially with the actual programmatic targets and technical modalities of joint projects. In this way total consonance will be achieved among all, Union members and non-members. Differentiation in other matters would not cloud or affect the universality and indivisibility of human rights protection.

Putting in place such a legal and judicial human rights architecture across the EuroMed area poses challenges of a political nature of course. It also poses challenges of a legal nature, some of which have been alluded to in this paper.

The main question raised here was whether it could not be contemplated that the existing European documents: the Union Treaties, the EU Charter of Fundamental Rights, the European Convention of Human Rights and Fundamental Freedoms, and the relevant provisions relating to the relative jurisdictions of the main courts, namely the Court of Justice of the Union and the European Court of Human Rights of Strasbourg, can be the objects of inspiration, adaptation, reproduction or reassembly in some other document itself indicated as required – with one main aim in view. This aim is that of giving to the individual citizen in each EuroMed state a right of access to justice, but also in such a manner as to ensure a certain minimum of homogeneity of interpretation and application across the EuroMed area in the context of the EuroMed *acquis*. The European Convention system is well known. The work of its Court – the European Court of Human Rights – is well known. It is recognised to be an independent Court, whose rulings are on the whole respected. It operates across nations and cultures as diverse as those of Malta, Norway, Azerbaijan, Italy and Turkey. It is not identified with the European Union as a political entity. It is a system that has integrity and independence.

It may not be politically feasible for the Union to push hard on seeking to «spread» the good word about aspects of its own *modus operandi* internally, or about the European Convention system. However, it is my view that the Union should be using its good offices to bring about general adhesion to the

European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 plus core protocols, for in the end this – combined with access to the European Court of Human Rights (if necessary combined with a flexible and sensitive reading of the last resort) – is what will guarantee (1) the uniform interpretation and application of the EuroMed *acquis* and (2) do this in line with universal and indivisible human rights and democratic governance.