The European Union has gone from being a purely economic organization towards an "ever closer union" with its citizens expanding its jurisdiction considerably. This Article, will argue that making the Charter legally binding will create a more visible human rights EU policy but that the way in which the European CJEU (CJEU) has developed its case law has, at times, been detrimental to the status of human rights above other objectives and principles of the EU. An analysis of the use of the European Convention on Human Rights (ECHR) and national constitutional traditions by the CJEU and finally, the omission of minority rights from the Charter will be presented, in order to show its impact on the development of an EU human rights policy.

KEYWORDS: Third Country Nationals; Charter; National Autonomy

The ECHR has assumed a position of "special significance" in the European Union. Accession by the EU to the ECHR, therefore, has seemed to be a logical step forward. The presumption that using the ECHR as a general principle would allow the MS to be sure of respecting their EU and ECHR obligations simultaneously is called into question by the ruling of the European Court of Human Rights (Strasbourg) in Bosphorus. In this case, the impounding by the Irish authorities of an airline leased by Turkey from the former Yugoslavia on reliance of a binding, and non-discretionary EC Regulation was held to be compliant with its obligations under the ECHR. Strasbourg showed deference to the CJEU by adopting quite a broad test to assess compliance with the ECHR, that of "equivalent protection." This test has the aim and effect of assuring that the supremacy of Union law is upheld arguably putting a 'principle' above the protection of human rights. The presumption of equivalent protection can only be rebutted in the case of "manifest deficiency" which is unclear and has led to legal uncertainty in terms of human rights policy. Arguably, Article 52 (3) of the Charter does not adequately remedy this deficiency. Opinion 2/94 is symbolic of the CJEU's reluctance to be subordinated to Strasbourg stressing the "fundamental institutional implications" that accession would entail. The CJEU revealed its "true fear" of its competences conflicting with that of the Strasbourg court, when it stated that accession was "incompatible with its role as supreme guarantor of the Union's legality." The Charter states that the rights contained therein should have the same "meaning and scope" as those laid down by the ECHR, yet the Strasbourg...
jurisprudence is confined to the preamble of the Charter. According to Carruthers, this would obligate the CJEU to have regard to the relevant case law in order to determine the "meaning and scope" of the Charter rights.

However, despite the explanatory memorandum requiring the CJEU to have regard to the case law of Strasbourg, these explanations do not have the status of law. Therefore, this could increase legal uncertainty with the potential for divergent interpretations of the rights.

Finally, Article 52 (1), dealing with restrictions on the Charter rights, diverges from the method followed in the ECHR which adapts the restrictions in accordance with each particular right or freedom. This could create future difficulties as, even if the two sets of rights were interpreted to have the same "meaning and scope," the limitation requirements would differ, therefore, leading to accusations of a "two-speed speed Europe." The reference to "objectives of general interest" referred to in order to justify a limitation, and which are further developed in the explanatory memorandum as being based in the "context of a common organization of the market" could result in an interpretation by the CJEU which would be subject to a criticism that the EU, in seeking to advance common market interests, does not give fundamental rights the supremacy they should have over other objectives or principles of the Union. Moreover, as the limitations must be "provided for by law"; legal uncertainty becomes apparent due to the explanatory memorandum being silent on this issue and therefore, not making clear the level of protection to be expected of the Charter rights. Triantfyllou argues that the Union has no "law concept" due to the absence of clear separation of powers between the Union institutions. Therefore, the circumstances in which the Charter rights can be limited are unclear.

However, the Charter does make the rights more visible and the level of protection for human rights has been raised, "this provision shall not prevent Union law providing more extensive protection." On a different reading of Bosphorus, it is evident that the test of "equivalent protection" was developed in order to avoid the paradoxical situation where States have to choose between compliance with the ECHR or the EU. This allows for a system where, in order for the "equivalent protection" test to be satisfied the State in question must have had an absence of any discretion in the implementation of the EC measure being challenged in order to be in compliance with its ECHR obligations. Moreover, the preliminary reference issued by the CJEU in Roquettes Frères shows its willingness to be bound by the Strasbourg case law which was in conflict with its own jurisprudence.

This is an encouraging ruling which may lead us to assume that the CJEU will adopt an expansive interpretation of the explanatory memorandum to arrive at the correct "meaning and scope" of the Charter rights by deferring to the Strasbourg jurisprudence. Adopting this approach under the Charter would result in a uniformity of ECHR interpretation and would conform to the aim of Art. 52(3) which seeks to establish the ECHR as a minimum standard in human rights protection and to avoid "divergent interpretations by the Luxembourg and Strasbourg courts."
National Constitutional Traditions

In *Nold*, the CJEU first affirmed the importance of national constitutional traditions as sources of general principles of law. The Charter text does not specify which constitutional tradition corresponds to each Charter right. The CJEU’s apparent deference to the national constitutional traditions occurred in order to assert the supremacy of EU law due to the challenges posed by the German constitutional court in *Handelgesellschaft* and subsequently in *Hauer*. The inclusion of “respective fields of application” in Article 53 shows the determination to preserve the supremacy of EU law by creating an “armistice” between the respective fields of law; national and Union. Whilst creating a politically acceptable solution for MSs who sought to protect their national constitutional rights from Union interference. Although it is debatable whether this has been achieved, the supremacy of EU law has arguably been compromised by the wording of Article 53 diminishing the strength of the fundamental rights. Its inclusion demonstrates the tension existing between the principle of uniformity of application of EU law and State sovereignty.

For example, in *Foto-Frost*, the CJEU placed an interdiction on national court’s ability to annul Union legislation. This could be interpreted as the CJEU seeking to advance the interests of the Union before the protection of fundamental rights. Furthermore, where the Court uses national constitutional traditions it is often in a “perfunctory and haphazard” way, which has created uncertainty as to when a national measure is subject to fundamental rights scrutiny due to the CJEU’s lack of “any reason for the difference in intensity of review.”

The lack of clarity was evident in the judgment in *Grogan*. The CJEU’s classification of abortion as a service showed its leanings towards the “lowest common denominator” approach, and in this respect following *Hoechst* in that it would not allow Ireland’s anti-abortion laws to infringe other State’s rights to avail of abortion as a service. Phelan contends that this categorisation has meant that the Court is disregarding fundamental rights in favour of the economic objectives of the Union and in order to uphold the principle of supremacy. The confusion in *Grogan* is apparent because of the lack of reasoning behind the distinction of *Cinéthèque* raising questions about the development of its jurisprudence. The confusion between market rights and fundamental rights could be exacerbated by the CJEU interpreting Article 53 in a way, which would allow it to balance market freedoms directly against the rights and freedoms incorporated in the Charter.

However, in *Grogan*, it could be argued that the CJEU could not have done otherwise than to avoid the ‘lowest common denominator” approach; it had to protect the Irish constitutional right without impinging on other States rights to have abortion as a legal activity. Furthermore, at the time that *Grogan* was decided; the EU had not acceded to the ECHR. Therefore, its judgment reflects the fact that it was trying to avoid diverging judgments, especially because Strasbourg would be deciding a similar issue in *Open Door*. Therefore, Article 52 (3) provides more clarity for the future as does Article 53 arguably. This is because the terminology used, “*nothing in this charter shall be interpreted as restricting or adversely affecting human rights,*” which implies that the highest standard of protection available should be applied to the individual, regardless of whether it is a national or Union law standard. But could supremacy, one of the key aims of the Charter, be compromised if this position was adopted?
Regardless, fundamental human rights should take precedence over the principle of supremacy in order for the EU to be taken seriously as human rights compliant.

Allowing national courts the competence to invalidate secondary Union legislation would send a strong message of inclusiveness of national courts in the determination of fundamental rights. This would bring Article 53 and 52 (4) of the Charter to full effect. If the EU wants to put human rights first it cannot treat uniformity as an "independent, self-legitimising principle"; human rights are established as general principles and violation of them can lead to invalidation of Union legislation whereas the same cannot be said for uniformity. Allowing national courts this power would create a fairer system of procedural justice for citizens whose human rights have been violated because they would not have to wait for a preliminary reference from the CJEU.

Additionally, this system would create a better relationship between the CJEU and national courts than at present where national constitutional rights seem to conflict with EU law. The wording of Article 53 seems to reinforce this opposition; "respective fields of application." However, if this system of review by the national courts was allowed, then the position in Omega would be followed in allowing "greater autonomy to MS to interpret rights as they see appropriate" which would mean that a coherent human rights policy could develop harmoniously between the national courts and the CJEU.

**Omission of Minority Rights from the Charter**

This omission suggests the CJEU's reluctance to protect fundamental rights of third-country nationals residing in the EU. This contradicts one of the aims that the Union was initially set up for; the protection of minorities displaced after World War II. The Lisbon Treaty prohibits discrimination on the grounds of nationality along with the Race Directive.

However, these provisions have been used in connection with "market based justifications.". The CJEU case law reflects the benefits accrued to the labour market from the free movement of EU migrant workers. In Konstantinidis it was held that the applicant's right to freedom of movement would be impeded if he could not do his job effectively because the Member State in which he was residing treated non-nationals of the EU discriminately compared with nationals.

The EU should be striving to uphold human rights, there should be no category of second-class citizens who do not enjoy the same rights as EU citizens. One way in which the CJEU can achieve this is through scrutinizing Member State measures. We have examined the tension existing between Member State constitutions and EU law impinging on these, for example, in Grogan. However, Article 51 (1) is conservative in this respect and appears to confirm the position taken in Demirel where the Court followed Cinéthèque in claiming that it had no competence to examine national measures for compatibility with fundamental rights, which fall 'outside of the scope of Union law'. Firstly, Cinéthèque concerned the free movement of goods, which should have been distinguished from the situation in Demirel, which concerns fundamental human rights. In Demirel, we see the Court placing principles above human rights as an absence of direct effect was used as a justification for the
judgment. However, the CJEU is showing overt discrimination here, because when examining a measure of Union law for compatibility with fundamental rights it has simply assumed that it has direct effect, and therefore, only affording effective human rights protection to EU citizens.

Although this distinction between citizens and non-citizens, is largely due to immigration policy being a politically sensitive area that MS are keen to have control over. This may in some way explain the judgment in Demirel. However, the CJEU took a bold step in Rutili where it was established that there would be strict controls over MS attempts to derogate from their obligations under EU law to ensure "the right of a national of any member state to enter the territory of another member state, to stay there and to move within it." However, this case only re-affirms the protection that EU citizens will receive in contrast to third-country nationals residing in the EU.

The Charter reflects this. The Charter does not remedy the deficiencies in the EU treaty but instead confirms the status quo; Article 21 (1) covers a wide range of discrimination but leaves out "national origin" therefore, Article 21 (2) does not provide a higher level of protection for third country nationals because it just confines "a significant form of discrimination within its own law...(and)...its remit is conditioned on EU citizenship." This is reinforced by Article 52(2) leaving no scope for an interpretation by the CJEU that would equalise rights of third-country nationals with nationals. Furthermore, the chapter on citizen's rights creates an obvious distinction.

Concluding Remarks

Overall, the Charter has made rights more visible through incorporation of the rights of the ECHR within the EU legal order, has reaffirmed the status quo which is a necessary departure from the "perfunctory and haphazard" jurisprudential approach adopted by the CJEU using the general principles of law. I have focussed on the important omission of minorities rights from the Charter as an important example of the absence of a "complete" human rights policy in the EU. Hopefully, judicial activism will ensure that third-country nationals are not left relying on "human allowances." In all of these areas, the EU must be seen to place human rights above economic objectives or general principles of law in order to be seen as a credible human rights organization.

Notes

1 Opinion 2/94 of the Court [28 March 1996], para. 33
2 Bosphorus v Ireland App no 45036/98 (ECHR, 30 June 2005)
5 Kuhnert, K. p. 185
6 Opinion 2/94, para. 35
8 Charter (n 1) C83/ 402, Article 52 (3)
10 Charter (n 1) C83/402
11 Alonso Garcia, R., p. 497
12 Charter (n 1) C83/ 402
16 Bosphorus
18 Costello, C. p. 107
19 Case C-94/00 Roquettes Frères SA v Commission [2002] ECR I-9011
20 Wetzel, J., p. 2860
21 Charter (n 1) C 83/ 402
22 Wetzel, J., p. 2862
23 Carruthers, S. p. 2
24 Carruthers, S. p. 3
26 Case 44/79 Hauer v Land Rheinland- Pfalz [1979] ECR 3727, para. 15
27 Charter (n 1) C 83/ 403
28 Besselink, L. (2001) “The Member States, the National Constitutions and the Scope of the Charter”, 8 Maastricht Journal 1, 6
29 Carruthers, S. p. 3
33 Williams, A. p. 562
34 Case C- 159/90 SPUC v Grogan [1991] ECR I- 4685
35 Craig, P. and De Burca, G. p. 388
38 Grogan
39 Cases 60 and 61/84 Cinéthèque v Fédération Nationale des Cinémas Français [1985] ECR 2605
40 Phelan, D. p. 684
42 Craig, P. and De Burca, G. p. 388
43 Alonso Garcia, R., p. 513
44 Wetzel, J., p. 2840
45 Leczykiewicz, D. p. 8
46 Leczykiewicz, D. p. 8
47 Leczykiewicz, D. p. 9
48 Case C-36/02 Omega Spielhallen- und Automatenaufstellungs- GmbH v Oberbürgermeisterin derBundesstadt Bonn [2004] ECR I- 9609, paragraph 35
49 Williams (n 41) 566
52 Case C-168/91 Konstantinidis v Stadt Altensteig [1993] ECR I-1191
53 Case C-168/91 Konstantinidis v Stadt Altensteig [1993] ECR I-1191, para 17
55 The provisions of this Charter are addressed…to the Member States only when they are implementing Union law », Charter (n 1) C83/ 402
56 Case 12 /86 Demirel v Stadt Schwäbisch Gmünd (1987) ECR 3719
57 Cinéthèque,
58 Case 12 /86 Demirel v Stadt Schwäbisch Gmünd (1987) ECR 3719, para. 28, in Craig, P. and De Burca, G p. 397
60 Williams, A. p. 563
61 Weiler, J. p. 78
62 As in Case C-168/91 Konstantinidis v Stadt Altensteig [1993] ECR I-1191
63 Case 36/ 75 Rutili v Minister for the Interior [1975] ECR 1219
64 Carruthers, S. p. 2