

Access to Justice in European Law: Moving from “Access to Courts” Towards a Substantive, Horizontal and Comprehensive Approach

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Abstract

The entry into force of the Lisbon Treaty in December 2009 was supposed to have far-reaching implications for the development of a European policy on justice and access to justice as it “constitutionalized” for the first time this important topic. However, at the time of writing, European Union (EU) law has been unable to construct and provide a proper system of access to justice for European citizens across all European Member States. In particular, the study of the case-law of the Court of Justice of the European Union in Luxembourg shows that the European model of access to justice based on litigation, access to courts and on the defense of individual rights is inherently limited. The author advocates a change of approach, aiming for a better definition of a substantive notion of access to justice in the light of a broad system of European social justice and equality. This new approach could be based on the classic theory and methodology of “access-to-justice” developed in the early 80s by Professor Mauro Cappelletti. His encyclopaedia on the topic offered a horizontal comprehensive strategy to construct a justice system and procedural laws based on the needs of the ordinary citizens.

Keywords: access to justice, EU law, European Convention of Human Rights, critique and methodology.

JEL Classification: K33, K41

1. Introduction

After the entry into force of the Lisbon Treaty on the 1st December 2009 in the European Union, “access to justice” was duly acknowledged in the field of European Law. Although access to justice is also relevant under the European Convention of Human Rights (ECHR),² and there is a rich jurisprudence of the European Court of Human Rights (ECtHR) in this regard,³ as well as different initiatives carried by the Council of Europe;⁴ this article will focus mostly on the EU legal order⁵. It aims to pave the way for a future convergence of all European law at the highest possible standard set by all the different European treaties.

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² The European Convention on Human Rights (ECHR) is a international treaty to protect human rights and fundamental freedoms in Europe. It was drafted in 1950 by the then newly formed Council of Europe and it entered into force on 3 September 1953. The ECHR Convention established the European Court of Human Rights (ECtHR). Under this treaty, any person who thinks his or her rights have been violated by a state party to the Convention can take a case to the Court. The rulings of the Court are not automatically legally binding, but the ECtHR still has the power to award damages. The establishment of a Court to protect individuals from human rights violations is an innovative feature for an international convention on human rights, and it was totally innovative in Europe. Contrary to classic public international law, the ECHR gives the individuals an active role on the international arena against their States although they have first to exhaust national remedies. The European Convention is still today the only international human rights agreement providing such a high degree of individual protection. Under the ECHR, State parties can also bring cases against other state parties to the Convention, although this power has been used on extremely few occasions.

³ Article 6 ECHR provides a detailed right to a fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time, the presumption of innocence, and other minimum rights for those charged with a criminal offence. Article 13 ECHR provides for the right for an effective remedy before national authorities for violations of rights under the Convention. Most of the violations that the ECtHR finds today in Europe are excessive delays, in violation of the “reasonable time” requirement, in civil and criminal proceedings before national courts.

⁴ The Council of Europe adopted several recommendations in the field some decades ago (‘Measures facilitating access to justice’ (1981) and ‘Principles of civil procedure designed to improve the functioning of justice’ (1984). More recently, its Commission for the Efficiency of Justice (CEPEJ) has created a special programme and has set up a system for the continuous evaluation of judicial systems in Europe. See more information at: <https://www.coe.int/en/web/cepej>.

⁵ For a perspective of European Fundamental Rights and the ECtHR in Strasbourg, see Storskrubb E and Ziller J, ‘Access to Justice in European Comparative Law’ in Franconi F (ed) *Access to Justice as a Human Right*, Oxford University Press, Oxford, 2007, 177–203.

2. The Treaty of Lisbon and the EU Charter of Fundamental Rights: the “constitutionalisation” of access to justice in EU law

The Treaty of Lisbon, to be more precise, the consolidated Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)⁶ confirmed the importance of justice in the EU legal order and introduced new provisions which relate specifically to access to justice.⁷

The TEU mentions the term “justice” in several of its provisions. First of all, when describing the values and objectives of the European integration process⁸. In this sense, Article 2 TEU reads that: “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

Also, Article 3 (ex-Article 2 EU Treaty) which lists the objectives of the EU, adds that the Union shall offer its citizens an area of freedom, security and justice without internal frontiers [...]. and that the Union shall combat social exclusion and discrimination and shall promote social justice and protection [...].

Together with the TEU, the TFEU states in article 4. 2. J) that the area of freedom, security and justice is a shared competence between the Union and the Member States. This clause is extremely important in order to understand the distribution of work and responsibilities within the European legal order and the judicial review of legality in the European legal order. Articles 4(1) and 5 TEU state the fundamental principles relating to competences and the principle of legality or conferral in EU law. According to Article 5 TEU: “1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.”

Also, Art. 4 (1) restates that “In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.”

The principle of legality is therefore a fundamental principle of European constitutional law. It means, in short, that any decisions taken by EU institutions must have legal foundation in the Treaties. Every competence for the EU and the manner in which that competence is exercised are conferred by the Treaty.⁹ For this reason, the principle of legality is usually known as the principle

⁶ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Official Journal C 83 of 30.3.2010 available at: <http://eur-lex.europa.eu/en/treaties/index.htm>.

⁷ The agreement on the Treaty of Lisbon followed the discussion about a constitution. A “Treaty establishing a constitution for Europe” was adopted by the Heads of State and Government at the Brussels European Council on 17 and 18 June 2004 and signed in Rome on 29 October 2004, but it was never ratified. To enter into force, the Constitution for Europe had to be ratified by all the Member States in accordance with each one's constitutional rules, namely either parliamentary ratification or referendum. Following the ratification problems encountered in France and the Netherlands, the Heads of State and Government decided at the European Council of 16 and 17 June 2005 to launch a “period of reflection” on the future of Europe. A broad process of debate with European citizens took place. At the European Council meeting on 21 and 22 June 2007, European leaders reached a compromise and agreed to convene an International Intergovernmental Conference (IGC) to finalize and adopt, not a Constitution, but a reform treaty for the European Union. The final text of the treaty, drawn up by the IGC, was approved at the informal European Council in Lisbon on 18 and 19 October. The Treaty of Lisbon was signed by the Member States on 13 December 2007. It contains most important content of the failed Constitutional project, but certain constitutional features had to be abandoned.

⁸ On this topic see Weatherill, S., *Law and Values in the European Union*, Oxford University Press, Oxford, 2016.

⁹ The TFEU contains a special title on categories and areas of Union Competence. (Arts. 2-6). This title mentions, and defines, different types of competences and it lists the (most) relevant areas. Like the previous EU Treaties, the Lisbon Treaty does not provide a list of negative competences, i.e., of areas where EU law can never have any influence (this had been suggested against the background of cases such as the ECJ, case *Tanja Kreil v. Bundesrepublik Deutschland*, case C-285/98, [2000] ECR I-69. ECLI:EU:C:2000:2).

of conferral or attributed powers.¹⁰ Competences are attributed to the EU through legal basis provisions agreed in the “constitutional treaty” which is the TEU.

Legal basis can be of general or special nature. The general legal basis for the EU to legislate in the field of access to justice is given in Article 67.1 of Title V – Area of Freedom, Security and Justice of the TFEU (ex Article 61 TEC and ex Article 29 TEU). This provision reads that: “the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”.

However, access to justice is, for the first time, mentioned as such with these terms in a specific legal basis provided by the TFEU. In Article 67.4 of same Title V (ex-Article 61 TEC and ex Article 29 TEU), it says that “The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. “

The European institutions now have to follow the ordinary procedure established for the law-making process in EU law. It is for the European Council to define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice (new Article 68 TFEU). In order to comply with the strategic guidelines defined at the highest political level, further legislative action at European level is needed. It is now established in Article 81.2. e) (ex-Article 65 TEC) that “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: e) effective access to justice“. It is for the European Commission to draft the proposals to be adopted by the Parliament and Council, according to the ordinary procedure.

Together with the general legal basis relating to justice, these two provisions of specific nature are essential for the development of access to justice within European law, as they do not only provide the necessary pillar for legislative action but they also influence the case-law of the Court of Justice of the European Union (sometimes referred as ECJ), an institution which has to rule on the basis these provisions when adjudicating disputes relating, directly or indirectly, to fundamental rights.

Furthermore, the EU Charter of Fundamental Rights also refers to justice in Articles 47 to 50¹¹. While the preamble of this EU Charter also states that the EU will create an area of freedom, security and justice;¹² it is Article 47 which guarantees access to justice in EU law, understood as a right to an effective remedy and to a fair trial:¹³ “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.“

To summarize all the above, it can be said that all these provisions in the EU Treaties and the EU Charter of Fundamental Rights show that there has been a “constitutionalisation“ of access to

¹⁰ The EU is not omnicompetent; its competences have been given and transferred by Member States on a case-by-case basis. The EU has neither a general legislative competence nor a single uniform legislative procedure applicable to all fields. Not only is the competence profile asymmetric, it also depends on different legal bases scattered throughout the Treaty. Different procedures and diverse legal instruments are allowed depending on which pillar of the Union is relevant to the subject and which policy is at stake. Legislative action can be exercised with diverse intensity and/or legal binding force. See Chalmers D., Davies G. and Monti G., *European Union Law: Text and Materials*, 4th edn., Cambridge, 2019, p. 111 ss. and 364 ss.

¹¹ Charter of Fundamental Rights of the European Union. Official Journal C 83 of 30.3.201. Text available at: <http://eur-lex.europa.eu/en/treaties/index.htm>.

¹² The Preamble of the EU Charter starts by saying: “The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.”

¹³ In the same Title VI of the EU Charter, other articles refer to justice. Article 48 states the presumption of innocence and right of defense. Article 49 reflects the principles of legality and proportionality of criminal offences and penalties. And Article 50 guarantees the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

justice in European Union law in the sense that, for the first time in the Treaties, the EU is given explicit power or competences to legislate in this area.¹⁴

3. Access to justice in European Union law: meaning, status quo and critique

It is now the task of the European legislator to develop in practice the engagements that the EU Treaty has guaranteed in the field of access to justice. And here this author argues that the most difficult questions are still unresolved for two reasons: 1) the narrow meaning of “access to justice” in European law¹⁵ and 2) the access to justice agenda and policy constructed on the basis of that narrow meaning that still needs to be developed in a substantive, holistic and comprehensive horizontal way¹⁶.

While the EU has developed a broad political project in the area of freedom, security and justice and it has approved a broad legislative package of cross-border procedural instruments within the policy area of judicial cooperation in civil matters;¹⁷ the process of European procedural harmonization in the field of justice and civil law is not completed. A general Directive on access to justice would be needed, an idea originally considered by the European Commission and then discarded for political and legal reasons.¹⁸

Critique to the EU policy in this area is not new. As Storskrubb noted, the regulation of cross border civil and commercial litigation is an expanding EU policy area where legislative measures and other initiatives have been already adopted in order to provide a common framework in the area of European procedural law.¹⁹ In spite of the limited competence of the EU in this field up to the Lisbon Treaty, the EU has developed a policy linking different areas of civil procedure, private international law and European law. But this European construction of civil procedural law for cross-border problems is not perfect. As Storskrubb summarizes:²⁰ “it does not directly entail harmonisation of national domestic civil procedures and has not taken the form of grand holistic procedural codification. Nevertheless, it is possible and even likely that the policy area will affect national civil procedures albeit perhaps in a piece-meal and random fashion. Ostensibly the measures of the policy area solely regulate cross-border cooperation structures rather than the

¹⁴ The doctrine in European law refers to “European constitutional law” even if the new Treaties are not formally the EU Constitution. This is because the EU’s treaties regulate the exercise of public authority at EU level, establishing a hierarchy of norms and legitimizing legal acts, providing for citizenship, and granting fundamental rights. In this way the treaties shape the relations between legal orders of the EU and the 27 national states. In view of many authors, a constitutional approach is necessary to understand the core issues of EU law. On the constitutionalisation of EU law see Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law*, Hart Publishing, 2009.

¹⁵ Both the Fundamental Rights Agency and the Council of Europe use the following key points and definition of “access to justice” which construct it as a notion of access to courts: “According to international and European human rights law, the notion of access to justice obliges states to guarantee each individual’s right to go to court – or, in some circumstances, an alternative dispute resolution body – to obtain a remedy if it is found that the individual’s rights have been violated. It is thus also an enabling right that helps individuals enforce other rights. • Access to justice encompasses a number of core human rights, such as the right to a fair trial under Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights, and the right to an effective remedy under Article 13 of the ECHR and Article 47 of the Charter. • Access to justice rights in the EU Charter of Fundamental Rights may correspond to those contained in the ECHR. ECtHR case law is therefore important for interpreting Charter rights. • Although different systems govern enforcement of the ECHR and the EU Charter of Fundamental Rights, both emphasise that the rights to an effective remedy and to a fair trial should primarily be enforced at national level.” See European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to access to justice, Report 16 June 2016. Luxembourg: Publications Office of the European Union available at: https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf.

¹⁶ The definition of “access to justice” given by the European Commission on its dedicated website is a proof of the narrow approach taken in the field based on a limited understanding of its content and scope. See European Commission definition at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/access-justice_en#access-to-justice-for-all.

¹⁷ On this generic EU policy in the field of civil procedural law, see Storskrubb, E., *Civil Procedure and EU Law: A Policy Area Uncovered*, OUP, Oxford, 2008.

¹⁸ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. OJ L 26, 31.1.2003, p. 41–47 available at: ELI: <http://data.europa.eu/eli/dir/2003/8/oj>.

¹⁹ The EU has adopted rules, for instance, on the cross-border service of documents, obtaining evidence, establishing jurisdiction and enforcement of judgments, enforcement orders, legal aid, alternative dispute resolution, payment orders, and small claims. In addition, overarching measures have been enacted including the creation a judicial network and judicial training structures.

²⁰ E. Storskrubb, “What Changes Will European Procedural Harmonisation Bring?” In Walker, J. and Chase, O.G. (eds), *Common Law, Civil Law and the Future of Categories*, Canada: LexisNexis Butterworths, 2010, pp. 403–420, at 420.

specific national procedures. As such the policy area can be seen to hinder true harmonisation and to create a double standard.”

It is the opinion of this author that work must continue to improve access to justice. As the situation stands now, the status quo and standard of protection is different from one country to another so that European citizens are not provided with comparable remedies for similar breaches of European law²¹.

The EU Agency for Fundamental Rights concludes the following: “Access to justice is a core fundamental right and a central concept in the broader field of justice. However, it is a right that faces a number of challenges throughout the EU”.²² A similar conclusion has been reached by a recent report of the European Law Institute: “whilst the European Union (EU) has put in place an increasingly sophisticated regulatory and policy framework aimed at the promotion of human rights“ [...] the latest reports “confirm the persistence of practical and legal barriers to access to remedy in the European context for victims of business-related human rights abuses.”²³

Some recent developments, however, point in the good direction regarding the problems of collective redress and the role of individuals as actors or even guardians of EU law. Collective redress provides access to justice when the rights have been violated by one and the same entity but affect many private persons. The American concept of “class action“, where the claims are all collected, helps in situations when individual action would have been extremely costly both in time and money²⁴. In this regard, the recently adopted Directive 2020/1828 on representative actions is currently under the stage of national transposition and offers both injunctive and redress measures in the field of European consumer law²⁵.

Another important step is that individuals can now report breaches of European law. The recently adopted Directive 2019/1937 on protecting reports on breaches of EU law²⁶ though protecting reporting done in the work context (protection of whistleblowers) is a promising starting point on engaging “bottom-up guardians of EU law“ outside courts²⁷.

However, in spite of these positive developments, further efforts are needed at European level to promote fundamental principles of civil justice not only for collective problems and/or cross-border situations. As Ziller has explained, the use of the same word “justice” to refer both to 1) equality and fairness and 2) the administration of justice per se ... has resulted in lawyers

²¹ Fundamental Rights Agency of the European Union and Council of Europe. *Handbook on European law relating to access to justice*. Report 16 June 2016. Luxembourg: Publications Office of the European Union available at: <https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice> and https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf.

²² For the EU Agency specialized in Fundamental Rights. “While access to justice typically means having a case heard in a court of law, it can more broadly be achieved or supported through mechanisms such as national human rights institutions, equality bodies and ombudsman institutions, as well as the European Ombudsman at EU level. Yet, FRA research shows that access to justice is problematic in a number of EU Member States. This is due to several factors, including a lack of rights awareness and poor knowledge about the tools that are available to access justice”. See EU Fundamental Rights Agency and Access to Justice topic at: <https://fra.europa.eu/en/theme/access-justice> (accessed 12 June 2023).

²³ European Law Institute. *Business and Human Rights: Access to Justice and Effective Remedies* (with input from the EU Agency for Fundamental Rights, FRA). Report 2022. This report lists some interesting initiatives and pilot projects currently going on in the European Union and is available at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Business_and_Human_Rights.pdf.

²⁴ A classic read on American access to justice problems and law is Rhode, D. L., *Access to Justice*, Oxford University Press, New York, 2004.

²⁵ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance). OJ L 409, 4.12.2020, p. 1–27. New consolidated text from 2 May 2023 available at <http://data.europa.eu/eli/dir/2020/1828/oj>. This new Directive gives powers to organisations or public bodies designated by European Union (EU) Member States to seek injunctive or redress measures on behalf of groups of consumers through representative actions (including cross-border representative actions). Both judicial and administrative procedures are contemplated, depending on the relevant area of law or relevant economic sector and the discretion of every Member State.

²⁶ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. OJ L 305, 26.11.2019, p. 17–56. Current consolidated act from 2023 available at: <http://data.europa.eu/eli/dir/2019/1937/oj>.

²⁷ Abazi, V., “The European Union Whistleblower Directive: A ‘Game Changer’ for Whistleblowing Protection?“, *Industrial Law Journal*, Volume 49, issue 4, 2020, pp. 640–66, available at <https://doi.org/10.1093/indlaw/dwaa023>.

overlooking one of the two.²⁸ While the principles of mutual recognition and efficiency are fundamental pillars of the European civil procedural architecture; an European approach to justice cannot be ignored. Fundamental guarantees, due process rights and the judicial protection of individuals and economic operators must be part of the European exercise as well. According to Storskrubb, this tension is still unresolved in EU law and the policy on civil justice must continue:²⁹ “now that a decentralised model with a broad corpus of measures has been enacted an emphasis on consolidation and in particular on fostering a discussion on the fundamental principles has been advocated as the way forward. Developments during 2008 within the policy area evidence a further emphasis on overarching and horizontal measures of consolidation and even of discourse as well as a further emphasis on deepening and developing the current measures as a means to ensure effective implementation. However, in the long run the salient question to answer will be whether mutual recognition and minimum standards are enough. The analogies from the EU internal market history show that they might in the end be replaced by more detailed and specific harmonisation. Therefore, the final chapter of the post modern procedural novel remains unwritten.”

Contrary to some specialists which came to the conclusion that an harmonization of European procedural law was not desirable nor feasible,³⁰ other specialists such as Storme,³¹ and more recently Hartkamp, Ziller, Francioni, and Van Gerven agree that it is necessary to advance harmonization of civil law at European level³² even if mutual dialogue at European level sometimes has an spill over-effect into domestic national orders.³³

But the harmonization of civil law should only be part of a broad exercise where we reimagine justice in a less liberal and more progressive way. It is clear that Europe certainly needs an agenda for justice in the 21st century borrowing the expression from Van Puymbroeck³⁴ so that the efficiency of the internal market can be accompanied by the development of socio-economic rights within the EU and all this complemented by the construction of a global equitable world.³⁵ As Pavlich has correctly pointed out, justice should not be fragmented between European and national levels within the EU/EEA internal market³⁶. Access to justice and justice itself should be the explicit goal of judicial reform³⁷ and a fundamental pillar in the dynamic construction and development of EU law.³⁸

This author argues that in the creation of a European judicial area, the European Union should move from treating access to justice exclusively as a question of mutual recognition or even harmonization of civil procedural laws as it should begin exploring the needs of a new paradigm. In this sense, the EU could start by considering an ideal of substantive justice within the limits of their liberal understanding of justice based on the maximum autonomy for individuals. A program such

²⁸ Ziller, Jacques, *The Value of Justice in the European Constitution* (January 15, 2006). EUI Law Working Paper No. 2006/08, Available at SSRN: <https://ssrn.com/abstract=910521> or <http://dx.doi.org/10.2139/ssrn.910521>.

²⁹ Ibidem on pp. 13-14. See also Storskrubb, E., ‘Steering the Tide – The Mid-Term Perspective for Civil Justice’ in Frände D et al, *In the Footsteps of Tampere – Justice in the European Union*, University of Helsinki, Helsinki, 2006, 1–34.

³⁰ For the debate see *inter alia* Legrand P., ‘Against a European Civil Code’, *Modern Law Review* 1/1997 pp. 44-63; Kerameus K., ‘Procedural Unification: The Need and the Limitations’ in Scott I (Ed), *International Perspectives on Civil Justice: Essays in Honour of Sir Jack I. H. Jacob Q.C.*, Sweet & Maxwell, 1990, pp. 47-66.

³¹ Storme, M. (ed), *Approximation of Judiciary Law in the European Union*, Nijhoff, 1994.

³² See also Hartkamp et al (eds), *Towards a European Civil Code*, Kluwer Law International, 2004, pp. 154-5 and Storskrubb, E. and Ziller, J., Access to Justice in European Comparative Law, in Francioni F (Ed.), *Access to Justice as a Human Right*, Oxford University Press, 2007, pp. 178-9. The book by Francioni is a classic reference of the study of access to justice in the field of international law. His main arguments can be read also in this paper: Francioni, F. (editor/s), *Access to justice as a human right*, New York: Oxford University Press: Academy of European Law, European University Institute, 2007, Collected courses of the Academy of European Law; XVI/4[AEL] available at: <https://cadmus.eui.eu/handle/1814/7728>.

³³ Van Gerven W, Bringing (Private) Laws Closer to Each Other at the European Level’ in Cafaggi F. (ed) *The Institutional Framework of European Private Law*, OUP, 2006, pp. 65-67.

³⁴ Van Puymbroeck, R.V., “Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century” World Bank Study No. 22539 (2001).

³⁵ Stieglitz, J. , *Making Globalization Work*, Norton, New York, 2006.

³⁶ Pavlich, G.C., *Justice fragmented: Mediating community disputes under postmodern conditions*, Routledge, London, 1996.

³⁷ Trubek, D.M. and Santos, A. (eds), *The New Law and Economic Development: A critical appraisal*, Cambridge University Press, 2006.

³⁸ Ziller, J., “The Value of Justice in the European Constitution”, *op.cit.* Available at SSRN: <http://ssrn.com/abstract=910521>.

as the European e-Justice program announced at the Stockholm Summit in December 2009³⁹ will not deliver results for citizens unless it addresses the most fundamental question of all: how to move from economic freedoms to justice through equality and fundamental rights.⁴⁰ In this task, it could be inspired by the theory of access to justice reformers developed long time ago.⁴¹ Only by understanding the fundamental deficit of access to justice affecting these days in the life of millions of European citizens may we create a better European legal order that satisfies present demands of justice.

4. The role played by the Court of Justice of the European Union (ECJ) in the field of access to justice

It is clear that the concept of access to justice therefore made an official entry into the European “constitutional” chart with the Treaty of Lisbon and the new TFEU. A new task was put on the table of the European legislator which needs to be followed closely. Together with the institutions which participate in the law-making process (European Commission, European Parliament and Council), the role of the Court of Justice of the European Union must be specifically studied, as this institution exercises a key role in European law concerning access to courts and fundamental procedural guarantees.

Three important reasons explain the key pivotal role of the ECJ. First of all, because its case-law is a legal source of European law so that the interpretation that the ECJ does on European law has effects *erga omnes*. Secondly, because the interpretation, application and enforcement of European law relies on decentralized model of access to justice in which all 27 judicial systems plus the European judicial level must pacifically coexist. And, in the third place, because the ECJ has been accused of not fighting hard enough barriers of access to justice in direct cases brought before its jurisdiction while insisting that effective remedies must be given for the exercise of European law at national level.

From a procedural point of view, European law is articulated in a system of direct and indirect actions which complement each other. In a nutshell, it offers direct actions to be brought before the ECJ for privileged actors such as the States and EU institutions and also indirect actions via the collaboration of national courts for individuals (preliminary reference procedure sent to the ECJ by national judges). Most important direct actions before the ECJ are the infringement procedure against States which violate EU law (Art. 258 TFEU ex. 226 EC), the action for annulment which allows for a review of the legality of a measure taken by EU institutions (Art. 263 TFEU ex 230), the action for failure to act against EU institutions when they fail their duties and are legally obliged to act (Arts 265 and 266 TFEU ex. Art. 232 EC) and the action for damages (Art. 340 TFEU). The most important indirect action before the ECJ is the preliminary ruling procedure whereby a national court seized with a matter related to national/European law turns to the ECJ requesting a judgment on the validity and/or interpretation of European law (Art. 267 TFEU ex. Art 234 EC).

The case-law of the ECJ has considered access to justice mostly under the prism of procedural law. It has approached it under the perspective of the effective protection of individual rights, considering procedural issues such as the necessity of providing effective remedies under European and national laws and giving access to courts for citizens who claim European rights. In fact, EU law marked a revolutionary step in 1963 with the seminal ruling in the case *Van Gend en*

³⁹ On 11th December 2009, the European Council unanimously endorsed the proposals for the new multiannual programme for the area of justice, freedom and security in the EU. See European Council, The Stockholm Programme — An open and secure Europe serving and protecting citizens *OJ C 115*, 4.5.2010, p. 1–38 available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF>.

⁴⁰ Micklitz, H., *The politics of judicial co-operation in the EU*, Cambridge University Press, 2005, pp. 5,28-67. See also from the same author “Failure or Ideological Preconceptions – Thoughts on Two Grand Projects: The European Constitution and the European Civil Code”, EUI Working Paper 2010/04, available at <http://hdl.handle.net/1814/14016>.

⁴¹ Cappelletti, M. (ed.), *The Florence Access-to-Justice project*, vols. 1-4, Giuffrè, Milan, 1978.

Loos⁴² providing legal opportunity for individuals to directly invoke, claim and enforce their European rights through national courts⁴³.

In the framework of this unique procedural system that calls for the collaboration of national courts, the ECJ has repeatedly ruled that EU Member States must provide effective remedies for the exercise of European law at national level under the principles of equality or non-discrimination, equivalence and effectiveness.⁴⁴ The ECJ has also affirmed that European law provides a complete system of legal remedies.⁴⁵ In this system, the case-law of the ECJ has been very liberal in the interpretation of the notion of courts or tribunals which can send references to the ECJ in the framework of the indirect actions. The ECJ has favored the role of national courts as ordinary courts of European law on a daily basis insisting, however, that supreme courts of last instance are obliged to send references when doubts concerning the interpretation or validity of European law arise. This has been affirmed with the doctrines of “acte clair” (case *Cilfitt*⁴⁶) and the new liability for judicial infringements of EU law (cases *Köbler*⁴⁷ and *Traghetti del Mediterraneo*⁴⁸).

At the same time, the European court has been very strict on the *locus-standi* of individuals or organisations who have tried to challenge the legality of EU law through direct actions in Luxembourg. In this sense, one might even say that the ECJ had developed until the entry into force of the Lisbon Treaty a double standard of access to justice, one for national courts and another one for itself.⁴⁹ This is so because in EU law, natural and legal persons (non-privileged applicants) can only bring legal cases before the ECJ to request the review of legality of EU law subject to certain conditions which limit their *locus standi*. Some cases illustrate the particular importance of the interpretation of the necessary standing of the applicants to bring cases directly before the ECJ. The doctrine developed in the case *Plaumann*,⁵⁰ the judgment in the case *Greenpeace*⁵¹, the Opinion of Advocate General Jacobs in the case *Unión de Pequeños Agricultores (UPA)*⁵² not followed by the judgment on appeal in the same case (*UPA*)⁵³, and the latest judgement *Jégo-Quéré*⁵⁴ all reflect that, in practice, the requirements of direct and individual concern requested by former Art. 230 EC (now Art. 263 TFEU) have had the effect of limiting the direct access of individuals before the ECJ in order to challenge the legality of EU law.

In short, the ECJ has interpreted too narrowly the rules concerning standing (which provide main access to direct judicial review in Luxembourg) while insisting, on the other hand, that EU law offers a complete set of remedies and actions in all circumstances⁵⁵.

The concept of “direct and individual concern” to qualify for *locus standi* under the EU Treaties is very strict. For the ECJ, direct concern means that the measure must directly affect the legal situation of the applicant. So, the obvious question is: to what extent does a private individual have the right to challenge a regulation which is more general? The important *Plaumann* judgment

⁴² ECJ, Case 26/62 *Van Gend en Loos v Nederlandse Tariefcommissie* [1963] ECR 1. ECLI identifier: ECLI:EU:C:1963:1.

⁴³ For a comment see Rasmussen M., 'Revolutionizing European law: A history of the Van Gend en Loos judgment', *International Journal of Constitutional Law*, Vol. 12(1), 2014. See also European Parliament. Briefing 2023: “60 years of Van Gend en Loos”, at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739326/EPRS_BRI\(2023\)739326_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739326/EPRS_BRI(2023)739326_EN.pdf).

⁴⁴ Méndez -Pinedo, M. E., “El acceso de los consumidores a la justicia comunitaria: hacia un Derecho procesal común”, *Estudios sobre Consumo*, no 43, 1997, p. 12-29.

⁴⁵ ECJ, case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339, at para 23. ECLI:EU:C:1986:166.

⁴⁶ ECJ, case 283/81 *CILFIT v. Ministry of Health* [1982] ECR 3415. ECLI:EU:C:1982:335.

⁴⁷ ECJ, case C-224/01 *Kobler v Austrian Republic* [2003] ECR I-10239. ECLI:EU:C:2003:513.

⁴⁸ ECJ, case C-173/03 *Traghetti del Mediterraneo v Italy* [2006] ECR I-5177. ECLI:EU:C:2010:335.

⁴⁹ See on this topic Craig, P. and de Búrca, G., *EU Law, Text, Cases and Materials* (4th ed.), Oxford University Press, 2007, 528. Most recent edition is from 2020.

⁵⁰ ECJ, Case 25/62 *Plaumann v. Commission* [1963] ECR 95. ECLI:EU:C:1963:17.

⁵¹ ECJ, Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) v. Commission* [1995] ECR II 2205. ECLI:EU:T:1995:147. This judgement was appealed to and upheld by the European Court of Justice; see ECJ, *Stichting Greenpeace Council (Greenpeace International) v. Commission*, Case C-321/95, [1998] ECR I-1651. ECLI:EU:C:1998:153.

⁵² ECJ, Case T-173/98 *Unión de Pequeños Agricultores (UPA) v Council* [1999] ECR II-3357. Opinion of the Advocate General Jacobs from 21 March 2022 available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2002%3A197>.

⁵³ ECJ, Case C-50/00 *Unión de Pequeños Agricultores*, [2002] ECR I-6677. ECLI:EU:C:2002:462.

⁵⁴ ECJ, Case T-177/01 *Jégo-Quéré v Commission*, [2002] ECR II-2365. para. 51. ECLI:EU:T:2002:112.

⁵⁵ Craig, P. and De Burca, G. (2020). *EU Law. Texts, cases and materials.*, Oxford University Press, 7th edition, p. 574.

from 1963 interpreted the notion of individual concern.⁵⁶ For the ECJ the plaintiff had to show that the measure in question affected him uniquely, by reason of some essentially feature that he alone had, or because his circumstances were unlike those of other individuals. This strict interpretation of individual concern in the case *Plaumann*⁵⁷ has rendered direct access for individuals and groups (so-called non-privileged applicants vis-a-vis EU institutions and States) extremely difficult in cases where review of general legislation is at stake. In many cases applicants have failed to secure standing, even though they have been significantly affected by the contested measure and even if they would have had legal standing so in many such cases in national legal systems⁵⁸.

Over the years, it has been extensively argued by academics and even by several Advocate Generals that the scope of persons with standing to sue in direct actions should be widened⁵⁹. In his Opinion on the Case *Unión de Pequeños Agricultores*⁶⁰, AG Jacobs recognized that a strict test of standing might act as a barrier to access to justice. However, the ECJ did not follow the opinion of AG Jacobs and ruled that it was not within its judicial powers to interpret the standing to bring an action for annulment in a distinct way. The ECJ stated that the scope of standing could only be widened through a reform of the EU Treaty. The case *Jégo-Quéré*⁶¹ confirmed this jurisprudence and legal reasoning. In both *UPA* and *Jégo-Quéré* the ECJ ruled inadmissible two actions for the annulment of EU regulations because the respective applicants did not satisfy the condition of individual concern.

Why does the ECJ insist that the test for individual standing under Art. 230 has to be a strict one? The most important reason is to keep the distinction between direct and indirect actions in EU procedural law. The ECJ seeks to justify the status quo by arguing that the Treaty provides a complete system of legal protection, with indirect challenge through Article 267 supplementing direct actions under Article 263⁶². The ECJ seeks therefore to prevent a deluge of applications for judicial review from individuals who would be better off bringing a remedy in the national courts.⁶³ Although the ECJ has repeatedly asserted that national courts do not have jurisdiction to declare that EU law invalid or to interpret European law, national judges can indeed make a reference to the ECJ in the framework of an indirect action. The ECJ might think that national courts could become a preliminary filter, using their judicial discretion and experience only to send cases to the ECJ where the application has a relative chance of success. But, as AG Jacobs pointed out in the case *UPA*, sometimes this scheme deprives applicants of an effective judicial remedy as Art. 234 could only be invoked “a posteriori” and when there was an action available before the national courts. An individual could not challenge EU law until he had already been adversely affected and by using a

⁵⁶ ECJ, Case 25/62 *Plaumann v. Commission* [1963] ECR95. ECLI:EU:C:1963:17.

⁵⁷ ECJ, Case T-177/01 *Jégo-Quéré v. Commission*, [2002] ECR II-2365. ECLI:EU:T:2002:112.

⁵⁸ Craig, P. and De Burca, G. *EU Law. Texts, cases and materials*, Oxford University Press, 7th edition, 2020, p. 574.

⁵⁹ In the earlier case *Greenpeace*, the ECJ hinted that the test for standing might be different from *Plaumann* where the interest of the petitioner was not economic. However, at the same time, the ECJ refused to consider the environmental issues in the case at hand, and standing was denied for the NGO. ECJ, Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) v. Commission*, [1995] ECR II-2205. ECLI:EU:T:1995:147.

⁶⁰ ECJ, Case T-173/98 *Unión de Pequeños Agricultores (UPA) v. Council* [1999] ECR II-3357. Opinion of the Advocate General Jacobs from 21 March 2002 available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2002%3A197>.

⁶¹ ECJ, Case T-177/01 *Jégo-Quéré v. Commission*, [2002] ECR II-2365. para. 51. ECLI:EU:T:2002:112.

⁶² Craig, P. and De Burca, G. *EU Law. Texts, cases and materials*, Oxford University Press, 7th edition, 2020, p. 574.

⁶³ In this sense, it searches to avoid the situation which has developed before the European Court of Human Rights in Strasbourg. But some associations such as the CCBE have proved that this would not be necessary the case and do not accept the floodgates argument. See House of Lords, UK, Report of the European Union Committee, *Report on the Future Role of the ECJ*, 15 March 2004, on p. 41. Report available at <http://www.statewatch.org/news/2004/mar/hol-ecj-47.pdf>. Dr Berrisch said: “On the question of the court being swamped, first of all, I would say, if there is a legal problem that merits legal protection, the argument that a court is swamped cannot be an argument to deny legal protection, to begin with. Secondly, in countries where it is possible to challenge directly an act of general application, the courts are not necessarily swamped with such actions, because not only must you be able to get to Luxembourg, you must also have a reasonable chance to win in Luxembourg, because otherwise you are going to waste your money. The European Court of Justice has not lightly struck down Regulations and Directives of the Community in the past, and that is also something that is well known” (Q 105). Advocate General Jacobs explained that the problem of overload would be for the CFI, not the Court, and he confirmed that both Community Courts had efficient procedures in place for dealing with unfounded appeals. As to the floodgates argument, he said that courts “generally find methods of dealing with large numbers of cases if they do arise by means of test cases or class actions, or the like” (Q 148).

national remedy which sometimes could not even exist. When the national remedy existed but the national court refused to make a reference this meant in practice that the individual had no remedy at European level either. The case law of the ECJ shows the difficulties of a decentralised system of justice in which national courts have no power to invalidate a measure adopted by the EU.

In spite of these arguments, the ECJ was not convinced to change its strict interpretation and it held in the case *Jégo-Quéré* that it was outside its powers because this required an amendment to the EU Treaties⁶⁴. This legal reasoning has been criticized because the ECJ has provided examples of creative jurisprudence expanding, for instance, the scope of the EU Treaties and EU procedural law in other cases.⁶⁵

The new wording of Art. 230(4) which became Art. 263 (4) in the Treaty of Lisbon opened up the *locus standi* for individuals compared to the old provision. The difference is that now there is no requirement of individual concern in relation to regulatory acts that do not entail implementing measures. But this reform was deficient in two ways:

1) the new TFEU did not define the term “regulatory acts” and this seemed to mean any act other than a legislative act; and

2) it did not reform the need for individual concern or interest in case of general legislation (directives, regulations), which is the factor limiting possibilities for direct action by non-privileged applicants in EU law and by collective associations such as NGOs who are defending rights of a more public nature such as environment or consumer rights.

As Craig and De Burca have pointed out: “the Lisbon Treaty amendment whereby individual concern does not have to be shown in relation to regulatory acts that are of direct concern and do not entail implementing measures was welcome. It is, however, clear from the case law thus far that this new exception to the general rule of needing to prove individual concern will not avail applicants who seek to challenge a legislative act, nor will it avail applicants if there is any form of implementing measure required to give effect to the EU act at national level”⁶⁶.

Professor Tridimas has argued that the fundamental right to judicial protection required that *locus standi* should not depend on the nature of the contested measure but on whether it affects adversely the interests of the individual.⁶⁷ Micklitz has always pointed specifically to the lack of remedies for collective rights in EU law: “the Treaty does not deal with collective rights, with the exception of Art. 230 (4) EC. Whether or not and under which requirements these articles grant NGO’s standing to sue has been the subject of major controversy even between the CFI [Court of First Instance] and the ECJ.”

According to this author, this reflects an individual conception of private law in line with 19th century philosophy where only individual enforceable rights are taken into account in a context of trans-border integration. Even when individually enforceable rights can in fact stand for collective interests these conflicts may only reach the Court if they can be presented in the form of individual rights, which is the strategy followed by companies or even NGOs when bringing cases to the ECJ.⁶⁸

An analogy here is possible. The House of Lords in the UK already concluded in 2004 that widening individual access to the Community Courts would help ensure the application of Articles 6 and 13 ECHR as well as Article 47 (Right to an effective remedy and to a fair trial) of the EU Charter of Fundamental Rights.⁶⁹

⁶⁴ On this topic see Ward, A., *Judicial Review and the Rights of Private Parties in EU law*, Oxford University Press, 2006.

⁶⁵ Prior to the TEU, art 173 judicial review only applied to acts adopted by the Council and the Commission which were expressly mentioned in the provision. However, in case 294/83, *Parti Ecologiste. 'Les Verts' v European Parliament* [1986] ECR 1339 the ECJ held that the acts of the European Parliament were also susceptible to review by the ECJ even if this was not mentioned by the EC Treaty. ECLI:EU:C:1986:166.

⁶⁶ Craig, P. and De Burca, G. (2020). *EU Law. Texts, cases and materials*, Oxford University Press, 7th edition, p. 574.

⁶⁷ House of Lords, Report of the European Union Committee, *Report on the Future Role of the ECJ*, 15 March 2004, on p. 43. Report available at <http://www.statewatch.org/news/2004/mar/hol-ecj-47.pdf>.

⁶⁸ Micklitz, H.W., “Failure or Ideological Preconceptions – Thoughts on Two Grand Projects: The European Constitution and the European Civil Code”, EU Working Paper 2010/04, available at <http://hdl.handle.net/1814/14016>.

⁶⁹ House of Lords, Report of the European Union Committee, on p. 43 available at <http://www.statewatch.org/news/2004/mar/hole-cj-47.pdf>.

It view of the above, it has to be concluded that the ECJ did not create a new test on standing to sue in the framework of direct actions of annulment of EU law while respecting the fundamental rights guaranteed by the ECHR and the EU Charter of Fundamental Rights. For the time being, the ECJ has failed to respect its own criteria for access to justice when tensions between rights and Member States interests have appeared.⁷⁰ The portrayal of the EU's complete architecture on remedies is coming under pressure today, due to loopholes in the treaties and the emergence of new societal challenges. And, paradoxically, the court's case-law on the autonomy of EU law is widening some of the gap in terms of access to justice⁷¹.

The conclusion of this section seems clear. As the editorial board of the blog EU law live put is: "it is time to improve the Union's justice system and to give voice in court to collective and individual interests in cases of unquestionable common and inter-generational concern"⁷².

5. Moving beyond the concept of access to justice as "access to courts" in European Law

Conclusions after examining both EU and ECHR legal orders point in the following direction. Access to justice in European Law, in both systems, is still understood and approached both at legislative and judicial levels in a narrow sense as strictly a question of judicial remedies and procedural law. It has been assimilated to access to courts and the obligation to provide effective judicial redress which is just one narrow part of the "access-to-justice" doctrine and methodology⁷³. In spite of the Treaty of Lisbon provisions and the case-law of both courts; it is regrettable that this subject still enjoys very little attention by general European law scholarship and that it has been deprived of its natural context both in comparative law and in the larger field of social sciences. In fact, although many countries and international organizations are struggling these days in order to ameliorate access to justice, including the United Nations, the Council of Europe and the European Union; the methodology and approach of the Cappelletti's doctrine⁷⁴ and other social sciences current theories are almost never mentioned as a backbone of their laws and policies.

European law offers a decentralized model of access to justice where competences are shared between the EU and Member States and national courts are considered the primary *for* (indirect actions).⁷⁵ It is also a fact that the limited liberalization of *locus standi* rule introduced by Lisbon Treaty has not brought an innovative reform of the European judicial system. This small change intended to redress some of the defects caused by the previous legal framework of the direct actions before the ECJ which excluded natural and legal persons of the right of general review of European legislation. However, the interpretation of standing requirements and a system focused on a strict understanding of the notion of individual interest have not evolved significantly in the last decade, excluding the review of questions of common interest such as the current climate crisis⁷⁶.

It is the conviction of this author that the access-to-justice approach developed in the decade of the 70's under the leadership of the Professor Mauro Cappelletti of the European University Institute should not be forgotten. This movement was based on the need for a promotional, activist state to make not only "fundamental" but also "social rights" effectively accessible to all citizens

⁷⁰ Abazi, V. and Eckes, Ch. (2018) Closed Evidence in European Union Courts: Security, Secrets and Access to Justice. *Common Market Law Review* 55(3), 753-782.

⁷¹ Editorial Comments: "Access to Justice in the EU Legal Order: Fit for Purpose". EU lawlive 20 December 2021 available at: <https://eulawlive.com/editorial-comment-access-to-justice-in-the-eu-legal-order-fit-for-purpose/>.

⁷² Ibid.

⁷³ On this topic, see Walker, Neil, 'The Theoretical Foundations of EU Law', in Claire Kilpatrick, and Joanne Scott (eds), *Contemporary Challenges to EU Legality* (Oxford, 2021; online edn, Oxford Academic, 17 June 2021), <https://doi.org/10.1093/oso/9780192898050.003.0002>, accessed 12 June 2023.

⁷⁴ See series of research projects which culminated in the publication in 1978-79 of the encyclopaedic work entitled Cappelletti, M. (ed), "Access to Justice – A World Report" in four volumes (six books). *The Florence Access-to-Justice project*, vols. 1-4, Giuffrè, Milan, 1978.

⁷⁵ See on the topic Tridimas, T. and Nebbia, P. (ed.), *EU Law for the 21st Century: rethinking the new legal order* vol.I, Hart Publishing, 2004.

⁷⁶ Editorial Comments: "Access to Justice in the EU Legal Order: Fit for Purpose". EU lawlive 20 December 2021 available at: <https://eulawlive.com/editorial-comment-access-to-justice-in-the-eu-legal-order-fit-for-purpose/>.

while recognizing, and indeed reinforcing, the ideal of private, individual freedom and initiative. The research was in fact a large comparative study on the quality of justice, i.e., of the minimum standards of our legal systems from the point of view of judicial and non-judicial fairness and from a social justice point of view.⁷⁷

Unfortunately, the conclusions pointed at the end of the 70^s by Cappelletti and by other scholars more recently⁷⁸ are still fundamental goals that are not fully achieved in Europe. This is regrettable because the access to justice doctrine provided the best framework and intellectual tools to understand our legal systems and proposed challenging solutions with a positive, creative and world-wide positive perspective. In spite of the inherent limits of the doctrine developed which were pointed out by Sarat⁷⁹ (access to justice may not insure per se justice or social reform and, beyond a certain level, expanded access may be costly and fail to deliver justice); this approach developed so long ago needs to be updated in the present context of European law and European integration, bringing up to the latest standards of jurisprudence concerning fundamental rights and confronting it with essential questions to which the development of the European internal market must respond.

Because access to justice is related to bigger social science questions such as distributive justice, equality, democratic governance, and social change both at European and international scale, we should start moving from a narrow concept of access to courts towards the notion of substantive justice and the full protection of fundamental rights in a broader perspective.⁸⁰ The final goal of social and democratic justice within the internal market and the European legal order should be our guiding light. We need new paradigms to understand the challenges of law and justice in the process of economic globalization⁸¹. Approaching access to justice as mere procedural access to courts in European law is clearly insufficient to produce a fair and equitable outcome for circa 450 million citizens (EU population). While the EU institutions have promised a new system of economic governance in Europe, this system should work in the benefit of the ordinary citizens. Although advancing and achieving access to justice in Europe is an elusive and never-ending task⁸² we should always consider as one of our main priorities. The Stockholm Program approved at the meeting of the European Council in December 2009 was a small step in this direction. As Jacques Delors declared in 2009,⁸³ access to justice maybe the only way to compensate citizens for the

⁷⁷ Other books were published following the sequence of research projects. For those interested in the bibliography published by the same author Mauro Cappelletti, see: *Access to Justice and the Welfare State*, Bruylant, Brussels, 1981; *Fundamental Guarantees of the Parties in Civil Litigation*, Giuffr , Milan, 1973; *New perspectives for a Common Law of Europe*, Bruylant, Brussels, 1978; and *Processo e ideologie*, Il Mulino, Bologna, 1969. In the field of European law, see Cappelletti, M. and J.A. Jolowicz, J.A. (eds): *Public interest parties and the active role of the judge in civil litigation*, Giuffr , Milan, 1975; Cappelletti, M., Seccombe, M. and Weiler, J. (eds.): *Integration through Law. Europe and the American Federal Experience*, Walter de Gruyter, Berlin, 1986.

⁷⁸ D. Rhode, *Access to Justice*, Oxford University Press, Oxford, 2004. This author describes how equal access to justice is one of America's most proclaimed principles and, paradoxically, how it is one of its most frequently violated. She sharply criticizes a legal system in which only the wealthy can afford justice and encourages policy makers, lawyers, and ordinary citizens to press for urgently needed reforms. Last but not least, she offers in a short concluding chapter, "A Roadmap for Reform," several kinds of different approaches to increase equal access to justice in the USA. See also F. Francioni: *Access to Justice as a Human Right* (Collected Courses of the Academy of European Law), Oxford University Press, 2007. This author compares international law and European law. For this author, in any legal system, respect and protection of human rights can be guaranteed only by the availability of effective judicial remedies. When a right is violated or damage is caused, access to justice is of fundamental importance for the injured individual and it is an essential component of the rule of law. Access to justice is part of fundamental rights in European and international law. On access to justice see also Parker, C. *Just Lawyers: Regulation and Access to Justice* (Oxford Socio-Legal Studies), Oxford University Press, 2000.

⁷⁹ See review of the access to justice project and book done by Sarat, A., "Access to Justice by Mauro Cappelletti, Bryant Garth, John Weisner, Klaus-Friedrich Koch", *Harvard Law Review*, Vol. 94, No. 8, 1981, pp. 1911-1924 available at: <https://doi.org/10.2307/1340740>. See also by Grossman, J. B. and Sarat, A., "Access to Justice and The Limits of the Law", *Law & Policy Quarterly*, Vol. 3, No. 2, April 1981, pp. 125-140.

⁸⁰ See Allegri, G., "New Social Movements and the Deconstruction of New Governance: Fragments of Post-Modern Theories in Europuzzle", *European Journal of Legal Studies*, vol. 1, no 3, 2008, pp. 1-17 available at <http://hdl.handle.net/1814/10212>, and Hendry, J., "Governance, Civil Society & Social Movements. Re-Claiming 'the Common'", *European Journal of Legal Studies*, vol. 1, no 3, 2008, pp. 1-12 available at <http://hdl.handle.net/1814/10218>.

⁸¹ De Jong, J. and Rizvi, G. (eds), *The State of Access. Success and Failure of Democracies to Create Equal Opportunities*, Brookings Institution Press, Washington, 2008.

⁸² Ricket, C.E.F. and Telfer, T.G.W., *International Perspectives on Consumers' Access to Justice*, Cambridge University Press, 2003.

⁸³ Jacques Delors, interview published in *El Pa s*, 6th December 2009.

unbalance created by an economic effective internal market based on a neo-liberalist approach that has freed capitalism from its social responsibilities.⁸⁴ As Micklitz has long advocated, equality and justice are essential in Europe. We should move from freedom to justice through equality in the European legal order, developing “justice” in a broad term.⁸⁵

A new comprehensive and horizontal approach and policy on access to justice is strongly needed in Europe. This is not going to be easy since the area of Justice is a shared competence between the EU and its Member States and not an exclusive one for the EU. This means that, unless there is an unanimous decision on a given Justice topic, it is up to each Member State, according to their national tradition and practice, to legislate on a given problem, as the case may be⁸⁶.

6. Conclusions

Access to justice in European law is still a promise that needs to be attained. In fact, EU law is not as neutral as it pretends to be, as it sets out a preference for judicial remedies as the main means of interacting with European law. While the EU has recognized some of the biases in this access to courts approach; it has slowly transformed its primary procedural law to include new actions of redress, collective action, and representative claims (thus opening the opportunity for individuals to benefit from representation by NGOs in bringing certain legal actions). However, these reforms, which are yet to be studied in a critical, analytical and systematic way; do not solve the main structural problem: the understanding of access to justice as a problem of “access to courts” and “access to remedies”. Even when access to courts is improved, strategic litigation should not be the only way to engage with EU law and enjoy European rights in a costly, privilege for a happy few. Citizens need and deserve a broader policy based on a full understanding of what really means a real substantive “access to justice”.

This article intends to recover the doctrine of access to justice in European law from the dusty shelves of the University libraries and to launch a process of debate and necessary reform in the framework of a horizontal and substantive European agenda for justice and fundamental rights for the 21st century. The EU Charter of Fundamental Rights, legally binding since 1st December 2009, still needs to be developed in a comprehensive and horizontal way at both European and national levels. The doctrine and methodology of access to justice developed by the school of Cappelletti in the 80^s still has to deploy its full effects in the European legal order. The efficiency of the European internal market needs to include, together with economic freedoms, equality, justice and fundamental rights (social responsibilities). Our present time of turbulences brings not only chaos and problems but also opens windows of opportunity that we should not waste. In the aftermath of the different crisis that Europe has gone and is going through, there is a wonderful challenge to re-orientate the European legal integration to its original goals of social and economic progress for the benefit of the citizens. Access to justice is an essential element of the European Union’s legal order. Thinking how to guarantee a fair and open justice system for all in times of deeper integration and difficult challenges is maybe one of the most important tasks ahead.

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⁸⁴ McLeod-Kilmurray, H., “Stichting Greenpeace and Environmental Public”, *Cambridge Yearbook of European Legal Studies*, 1999, no 1, p. 269.

⁸⁵ Micklitz, H.W., *The Politics of Judicial Cooperation in the EU*, Cambridge University Press, 2005, p. 5.

⁸⁶ See European Commission. Reply to the United Nations. Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons 11th Session. Available at: <https://social.un.org/ageing-working-group/documents/eleventh/Inputs%20IGOs/EU%20-%20Access%20to%20Justice.pdf>.

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