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THE POSITION OF THE INDIVIDUAL IN THE EUROPEAN UNION THROUGH THE LENS OF THE ACCESS TO JUSTICE

ABSTRACT

This paper aims to question the position the individual has in the European legal sphere, understanding it as a fundamental topic within the frame of general international law. Since the positive international law lacks a normative definition of the subject, partly because of the inherent complexity of the problem, and partly because of the terminological inconsistency, this work aims to point on the major theoretical and practical dimensions of the issue at hand, focusing on the European region. The author will pay special attention to the procedural level of the individual's position, embodied by the right of individual to access justice in the European Union. The author will question the capacity for action, which is the ability of individual to initiate proceeding of judicial and other relevant authority. Inevitably, the attention will be given to the interrelation between the ECtHR and the ECJ with regard to the status individual has before two major judicial bodies in Europe. The paper aims to offer significant scientific and social contribution to enlightening the controversies over the traditional understanding of the individual`s position in positive international law, and to offer a new approach, especially with the relation to the standing of the domestic and regional legal theory and practice, as well as the consequences such new approach entails.

The author will use the following scientific methods in the project: comparative method, method of analysis and synthesis, historical legal method and sociological method.

Keywords*: Individual, European Union, European Court of Human Rights, European Court of Justice*

1. INTRODUCTION

The controversy over the position of the individual in international law is nothing less current now than it was in late 20s when Professor Spiropoulos delivered his lecture at The Hague Academy of International Law titled "*L'individu et le droit international*", starting with the thought: "*Le problème de la position de l'individudans la vie juridique internatonale est a l´heure actuelle un des problems*

les plus discutes de notre discipline".[1]As one of the timeless problems of the international legal doctrine, debate over the legal status of the individual still occupies legal scholars from all around the globe. Moreover, we are still as far from reaching the unique standing on it as ever before.

The position of the individual in a legal system, international or regional, is a vast topic, examined through centuries, and yet sorely controversial. Legal scholars since the very beginning of the development of the international legal thought questioned legal status of the individual in internal and external legal frames, questioning the possession of the recognised constituent elements of the notion of subjectivity. Traditionally, it has been widely accepted that only sovereign states and international organisations possess full legal personality and subjectivity in international law. The massive change in understanding of the legal status of the individual came under the spotlight again in the recent years.

Whether the individual is or is not subject of international law is an age-old issue. We tend to agree with Professor Brownlie when he wrote that *"[i]t is common for writers to pursue problems relating to the status of the individual in international law in terms of the large theoretical question"*[2], which might not be the only way in assessing the individual´s position. Since the question previously proposed demand a broad analysis, in this contribution we intend to approach one particular element inherent to the international legal personality, which is the procedural level of the individual's position, embodied by the right of individual to access to justice. In accordance with the general topic of the Conference, our focus will be directed specifically to the European legal sphere.

Questioning only active capacity of the individual, and leaving all other elements aside, we indent to prove that the ability of individual to *"directly, by his own actions, start international mechanism for protection of his rights and interests"*[3], which presents an active dimension of the international subjectivity, is of decisive importance for the assessment of the individual's position. Main motive for this research is to question the importance of the individual´s access to justice for its overall position in the given legal system. In most of the academic considerations to this topic, the authors identified major constituent elements of the subjectivity, amongst which the ability to protect himself before the courts and other bodies has the important place. Even though the individual is still far from being granted

1 Spiropoulos, J., „L'individu et le droit international", *Recueil des cours*, vol. 30, 1929, pp. 192 – 270.

2 Brownlie, I., *The individual before tribunals exercising international jurisdiction*, International and Comparative Law Quarterly, Vol. 11, Issue 3, 1962, p. 702.

3 Kreća, M., *Međunarodno javno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2016, p. 133. (translated by author)

the full procedural capacity on the international level, due to the dominant understanding of the central role of the State, inherited from the classical law, there are, however, some strong arguments in support of the ongoing evolution of the individual´s position. Specifically, the European region, embodied by the Council of Europe and the European Union, leads in the progressive steps towards full and efficient protection of the human being.

2. WHY IS THE ACCESS TO JUSTICE RELEVANT FOR THE ASSESSMENT OF THE POSITION OF THE INDIVIDUAL IN THE EUROPEAN LEGAL SPHERE?

Without imposing a unique view on the status of the individual in international law, Shaw subtly highlights that the "*essence of international law has always been its ultimate concern for the human being*".[4]Even though primarily developed under the auspices of human rights law, in the present reflections on the subject, the issue of the individual´s status exceeds the human rights field and goes well beyond it.[5] In other words, not only human rights law governs the individual-related issues, but also some other fields of pubic international law. For instance, it is widely accepted that apart of possession of rights and duties in international law, the individual could also be held responsible for the breach of legal norms that constitute part of the international criminal law, etc.

Furthermore, the legal status of any entity in international law could not be assessed fully without taking into the consideration its procedural capacity. In spite of the fact that the individual does not possess full procedural capacity in the general international law, it is reasonable to conclude that this capacity represents one of key constitutive elements of subjectivity. If there is one factor to be determined for the effective protection of the individual´s interests and rights, that would be the ability of the individual to initiate proceedings against any state or international organisation before national and international juridical bodies. Effectiveness of the legal regime guaranteeing individual rights could be maintained only if the individual who suffered from the injury has capability of initiating the judicial mechanism against anyone that caused the injury.

According to Professor Cançado Trindade, "*the right of access to justice (comprising the right to an effective domestic remedy and to its exercise with full judicial guarantees of the due process of law, and the faithful execution of the judgement), at national and*

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4 Shaw, M., *International law*, 7th edition, Cambridge University Press, Cambridge, 2014, p. 188.

5 For the overall analysis of the legal status of the individual beynd human rights, see: Peters, A., *Beyond Human Rights: the legal status of the individual in international law*, Cambridge University Press, Cambridge, 2016, pp. 602.

international levels, is, in effect, a fundamental cornerstone of the protection of human rights."[6]Especially at the regional level, where the individual has capacity to initiate proceeding before variety of bodies, the right of access to justice represent substantial guarantee of the effective legal regime.

3. ACCESS OF THE INDIVIDUAL TO EUROPEAN JUSTICE

European community of states has, through centuries, been characterised by several different ways of merger. After the World War II, the Churchill´s idea of uniting and rebuilding the European nation has been implemented in two ways. One of them represent the most advanced organisation for the promotion and protection of human rights in the contemporary world, Council of Europe (CoE), consisted of 47 European states and the other represents the European Union (EU), the economic and political union of 28 states, already members of the CoE.

It is beyond any doubt that for the sake of gaining effective protection of its rights, every individual has to have an access to justice starting with the national, up to supranational level. Since all the Member States of the EU are already being members of the CoE and therefore signatories to the European Convention of Human Rights (ECHR, the Convention), every individual has a right to seek for a remedy against the actions of his own state before the Strasbourg Court, in accordance with the Convention. Besides the power to initiate proceedings against his state, the individual has to possess the same power against the international organisation, especially in cases when the actions of that organisation have direct effect on the individual, as in the case of the EU. Since, in the words of professor Peters, EU enjoys a special position among numerous international organisations,[7] our research will be focused mainly on the ability of individual to start direct complaint procedure against EU institutions and bodies.

3.1. European Union

3.1.1. *Historical background*

Direct access of the individual to the judicial bodies was inherent to European communities since the beginning of the development of first integration project after the World War II. Already at the time, the individual could submit the application to the Court under the same conditions as Member States, or the com-

[6] Cançado Trindade, A. A., *Some Reflections on the Right of Access to Justice in Its Wide Dimension*, Contemporary Developments in International Law, Essays in Honour of Budislav Vukas (ed. R. Wolfrum, M. Seršić, T. M. Šošić), Brill Nijhof, Leiden, 2016, p. 458.

[7] Peters, A., *op. cit.* note 5, p. 490.

munity bodies. Thus, the idea of placing individual in the almost equal position to other entities before the European court, on a higher level than national, had its proponents in the early 50s. Furthermore, the individual had been granted an access to the supranational court in the field that goes beyond human rights, since none of the first European communities dealt with the human rights in any way. Surely, from the historical prospective, the procedural capacity of the individual was a progressive idea as such. However, one has to bear in mind that the detail requirements for the access to the Court were given in the treaty establishing the respective community and were far from the ideal state of matter.

The first Court of Justice was established by the Treaty of Paris, signed in 1951, as a principal judicial institution of the then founded European Coal and Steel Community (ECSC).[8] Even though the ECSC was highly specialized and substantially related to the heavy industry, with the Court whose competence was limited to coal and steel disputes, or in other words whose jurisdiction was to "*ensure the rule of law in the interpretation and application of the Treaty constituting the Community and of its implementing regulations*"[9], for the purpose of our study it is worth noticing that the individuals were given the *locus standi* before the Court. According to Art. 66, para 5.2 of the Treaty "*actions can be brought by any person directly affected*".[10] It might be worth noticing that in the abovementioned case, the term individual was related to the coal and steel producers or even buyers in some cases, rather than any interested person.[11]

When summarizing the principal functions of the Court, Lagrange *inter alia* stipulates that the Court was "*entrusted with the protection of individual rights against the arbitrary and the illegal action of the Administration*", which was of a decisive importance for the individual since national judges did not have that competence after establishing the ECSC.[12] As a matter of fact, it was obvious that the individuals, together with the associations and enterprises, initiated proceedings against

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8 Traité instituant la Communauté Européenne du Charbon et de l'Acier, URL=http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11951K/TXT&from=EN. Accessed 5 February 2017.

9 Brownlie, I., *op. cit.* note 5, p. 712.

10 Valentine, D. G., *The Court of Justice of the European Coal and Steel Community*, Martinus Nijhoff, The Hague, 1955, p. 132.

11 As an illustration, Gormley quotes the case from 1954, when „*the Court rejected the complaint of an association of consumers for the reason that it had no standing before the Court under the terms of the Treaty permittingonly associations of producers to appear as litigants*". Gormley, W. P., *The Procedural Status of the Individual before International and Supranational Tribunals*, Martinus Nijhoff, The Hague, 1966, pp. 142 – 143.

12 Lagrange, M., *The role of the Court of Justice of the European Communities as seen through its case law*, Law and Contemporary Problems, Vol. 26, Issue 3, 1961, pp.404 - 405.

the High Authority more often than Member States. The reasoning behind that might be the fact that the States' interests were less likely to collide with the interest of the ECSC, unlike individuals who represented most commonly opposing economic and social group.[13]

In the upcoming years, the idea of European unity has taken on a wider scale and culminated with the adoption of Treaties of Rome in 1957, and the establishment of two other communities, the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM).Under the same treaties, the Court of Justice of the European Communities was created, soon becoming a unique body with jurisdiction in matters relevant to all three, then existing, communities.[14]"*The Rome Treaty provides that the Court of the European Economic Community may review the legality of the decisions of the Council and of the Commission. Individuals and private corporations may appeal to the Court under the same conditions as a member State, the Council and the Commission*."[15]In other words, the individual could seek protection against actions of the Community institutions in the same way as governments. They had direct access to the Court, of course, with some limitations but without any need for the activation of the diplomatic protection mechanisms, which were still necessary in case of individual protection at the international level. That is why some authors from that time tend to conclude that "*the individual is a subject of Community law, though he does not possess the status equal to that of Member States*".[16]

When comparing the relevant provisions from all three treaties, related to the *locus standi* of the individual before the joint Court of the Communities, it is evident that the drafters of the first treaty establishing ECSC reached by far the most favourable solution for the individual. Thus, according to Article 33 of the ECSC Treaty, Article 173 of the EEC Treaty, and Article 146 of the EURATOM Treaty, the procedural capacity has been recognized to all persons.[17] The main difference, however, lies in the additional criteria that had to be met, according to each treaty. While under the ECSC Treaty the only condition on the side of the applicant was that he was "*affected by*" the action against which he is appealing or "*deem to*

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13 *Ibid*., p. 405.

14 The Convention on certain institutions common to the European Communities, which was signed on the same day sa the Rome Treaties, established that the ECJ was to replace the Court of the ECSC. Further information on the history of the Court of Justice available at: URL=http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-08/histoire_en.pdf. Accessed 5 February 2017.

15 Brownlie, I., *op. cit.* note 5, p. 712.

16 Gormley, W. P., *op. cit.* note 11, p. 135.

17 *Ibid*, p. 147.

involve an abuse of power affecting them"[18], the wording of the latter two treaties consist of a bit restrictive solution. Article 173 of the EEC Treaty reads as follows: "*Any natural or legal person may ... appeal against a decision addressed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and specific concern to him.*"[19] As mentioned above, under the treaties establishing the EEC and EURATOM, the applicant had to be directly, personally affected by the action against which he is appealing. What it meant being individually concerned the Court explained already in 1962, in *Plaumann & Co v Commission*, stating that "*[p]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.*"[20] Ever since this case, the Court introduced restrictive approach in the interpretation of the capacity to bring an action before it.

It is considered that the main reason behind previously quoted solution was the intent of the Member States to narrow the Court´s jurisdiction. Gormley believes that this solution "*must sadly be conceded to represent a clear intention on the part of the Member Governments to return to the traditional object theory of classical international law, for under Article I73 the States have been given a favoured position.*"[21]

3.1.2. *The Individual in the EU after Lisbon*

The entering into force of the Lisbon Treaty brought massive change in the overall status of the individual within the legal scope of the EU. Even though, regarding recognition and protection of human rights, the EU took the opposite way than usual, with having Court recognised human rights in its case law before having them formally implemented to a treaty[22], it was still necessary to adopt, we might say, a proper human rights document. That has happened in 2000, by adoption of the Charter of Fundamental Rights of the European Union. However, even adopted, the Charter did not come into the force until the 2009 and the entering into the force of the Lisbon Treaty. According to the words of a former president

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[18] Art. 33 of the ECSC Treaty.

[19] Art. 173 of the EEC Treaty.

[20] Case 25-62 *Plaumann & Co v Commissionof the European Economic Community* [1963] ECR 1963, p. 107.

[21] Gormley, *op. cit.* note 11, p. 150.

[22] For the detail analysis of fundamental rights as judge-made law, see: Rossas, A., *The EU and Fundamental Rights/Human Rights*, International protection of Human Rights: A textbook (ed. Krause, C.; Scheinin, M.), Institute for Human Rights, Turku/Åbo, 2009, pp. 443 – 474.

of the European Commission, José Manuel Barroso, a goal of the Lisbon reform was to "*put citizens at the centre of the European project*".[23]Hence, it was rightly expected that the Lisbon reform foster advancement of the environment in which individuals can use Union law to enforce their rights.

The Treaty of Lisbon, consisted of two renewed treaties, Treaty on European Union and Treaty on the Functioning of the European Union (further reference: TEU and TFEU), entered into force on 1 December 2009.[24] It has introduced "*a new nomenclature*"[25] for the judicial system of the European Union. As from September 2016, the judicial institution of the EU consists of two bodies: the Court of Justice and the General Court. The Civil Service Tribunal, established in 2004, has ceased to operate on 1 September 2016 after its jurisdiction was transferred to the General Court.[26]

Generally speaking, the competence of the Court of Justice relates to the review of the lawfulness of the Community measures, with recognised ability of the individuals to access the Court in case of the infringement of their rights. It might be worth noticing that the Court of Justice, unlike the Court in Strasbourg, does not recognize any specific human rights remedy, but the individual could initiate the usual proceeding, in a manner stipulated by the Treaties. Yet, having in mind the specific nature of the European Union as an international organisation, such legal status of the individual shouldn't be surprising. As professor Von Bogdandy stressed with eloquence, *"[t]he European legal order started as functional legal order: it was set up in order to integrate the European peoples and States, mainly through an integration of their national economies. European law has been an instrument for political and social transformation of completely new dimensions for democratic societies, not meant to protect, but rather to change them with a view toward a common European future*."[27]

Anyhow, the individual found its way to the European justice. As stated in literature, "*two roads lead to Luxemburg. One goes straight, the other takes a detour via*

23 Quoted in: Peters, A., *op. cit.* note 5, p. 490.

24 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union are reproduced in [2016] O.J. C 202, pp. 1–388.

25 Barents, R., The *Court of Justice after the Treaty of Lisbon*, Common Market Law Review, Vol. 4, Issue 3, 2010, p. 709.

26 General presentation of the Court of Justice of the European Union, available at URL=http://curia.europa.eu/jcms/jcms/Jo2_6999/en/. Accessed 2 February 2017.

27 Von Bogdandy, A., *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, Common Market Law Review, Vol. 37, Issue 6, 2000, p. 1308.

the national courts."[28] In this paper, we are focusing on the most effective one, the right of direct appeal.

With regard to the right of direct appeal of individuals, the only relevant provision, and method available to the individual, is stipulated in Article 263 (4) TFEU (*ex Article 230 (4) TEC*):

> "*Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*."[29]

Therefore, according to the wording of the previously quoted article, any individual may bring action against an act as long as the act concerns that person directly and individually. At the same time, all actions brought by individuals against Community could be declared inadmissible if the Court finds that the abovementioned requirement is not fulfilled.[30] Individuals, as co-called "non-privileged applicants"[31], are facing few possible scenarios. Either they are being addressees of the act against which they are initiating the proceeding, or the act is of direct and individual concern to them (this provision is nothing new, since it has been the same since the Rome Treaty), or, as a last case scenario, they are challenging the regulatory act that is (1) of direct concern to them and (2) does not entail implementing measures.

As it may be seen, the wording of the new article suffers from many ambiguities. Many questions arose from the final part of the provision stated above. Starting with the scope of the term "regulatory act", all the way to the already mentioned "direct concern" and "implementing measures". Not even legal doctrine nor practitioners are entirely convinced in the meaning of the controversial article. Additionally, the case law of the Court, relying on not-so-convincing arguments in several cases, does not help in clarifying the ambiguity completely.

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28 Schwensfeier, H. R., *Individuals´ Access to Justice under Community Law*, University of Groningen, doctoral thesis, 2009, p. 13.

29 Article 263 (4) TFEU (Lisbon), ex Article 230 (4) TEC

30 As a matter of fact, some authors argue that nearly all action brought by individuals against Community regulations failed because of the un fulfilment of this condition. See: Barents, R., *The Court of Justice after the Treaty of Lisbon*, Common Market Law Review, Vol 47, Issue 3, 2010, pp. 722 – 724.

31 Schwensfeier, H. R., *op. cit.* note 28, p. 43.

A former ECJ judge, Everling, claims that all kinds of regulations, including legislative acts fall within the scope of the abovementioned article.[32] On the other hand, there are others who tend to understand the meaning of the provision narrowly and argue that the direct challenge is limited to non-legislative acts only.[33] However, if we bear in mind that the reasoning behind the article 263 (4) TFEU was to promote judicial protection of the individual, as well as the fact that the language used in the Treaty suggests that the term "regulatory act" should be taken broadly, since the term "non-legislative acts" has been used in the Treaties elsewhere[34], than we are closer to the conclusion that the individual could directly challenge both kinds of acts before the Court.

Yet, even though our conclusion might be more favourable for the overall position of the individual in the EU legal sphere, it does not mean that it is being supported by the appropriate case-law. In the *Inuit* case Court proposed restrictive view and stated that "*it is apparent from the third limb of the fourth paragraph of Article 263 TFEU that its scope is more restricted than that of the concept of 'acts' used in the first and second limbs of the fourth paragraph of Article 263 TFEU, in respect of the characterisation of the other types of measures which natural and legal persons may seek to have annulled.*"[35] Therefore, according to the Court´s view, the "regulatory act" cannot mean any type of act, but only non-legislative acts of general application, since any other understanding "*would amount to nullifying the distinction made between the term 'acts' and 'regulatory acts' by the second and third limbs of the fourth paragraph of Article 263 TFEU*."[36] It seems that the Court did not take into the consideration the fact that many authors had pointed to, that there is also a distinction made in the Treaties between regulatory acts and non-legislative acts of general application.[37]

The other path available to the individual, mentioned at the beginning of this chapter, is the possibility of the individual to challenge the Union acts indirectly, through the procedure of the national court. As suggested before, this option is

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32 Everling, U., *Rechtsschutz in der Europäischen Union nach dem Vertrag von Lissabon*, Europarecht, 2009; reffered by: Balthasar, S., *Locus Standi Rules for Challenges to Rgulatory Acts by Private Applicants: The New Article 263 (4) TFEU*, European Law Review, vol. 35, 2010, p. 544.

33 *Ibid.*

34 Some of provisions that refer to „non-legislative acts of general application" are consisted in Article 290 (1) and Article 297 (2) TFEU; referred by: Balthasar, S., *op. cit.* note 32, p. 545.

35 Case C-583/11 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2013] ECR, par. 58.

36 *Ibid.*

37 Van Malleghem, P. A.; Baeten, N., *Before the law stands a gatekeeper – Or, what is a „regulatory act" in Article 263 (4) TFEU? Inuit Tapiriit Kannatami*, Common Market Law Review, Vol. 51, Issue 4, 2014, p. 1198, 1204.

more demanding and definitely less certain than the direct access to the Court. Still, it means additional support for the individuals' position in the EU. According to the view of the Court in *UPA* case from 2002, *"[u]nder that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty*, [now, article 263 TFEU, *op. a.*] *directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid* [...] *to make a reference to the Court of Justice for a preliminary ruling on validity."*[38]

Uncertainty of the proposed alternative is the most visible through the dominant role of the national court that decides on the formulation of the question, as well as the possibility of the national court to refuse to refer to the ECJ.[39] Also, the indirect procedure could require more time and finances.[40]

Even though we are not fully convinced that the view proposed by the Court in *UPA* case, that the remedy available before the national court is as effective as direct access to the Court of Justice, we admit that the subsidiarity does not necessarily lower the procedural capacity of the individual. According to Article 19(1) of the TEU, „*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*"[41] In the multi-level juridical system, as the one in the EU, "*the level at which the rights are established and the level at which legal protection is granted institutionally are often not the same*".[42] However, it should be noted that the indirect path leading to justice could be strewn with thorns and reaching light at the end of the tunnel questionable.

3.2. The individual in the Council of Europe

3.2.1. *Historical overview*

In the aftermath of the World War II, when creation of the first regional organisation on European ground took its place, the position of the individual in international law was stilling shadow of the idea of absolute sovereignty of the state, especially in the human rights field. By proposing mechanisms for supervision of

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38 Case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR 2002 I-06677, par. 40.

39 Van Malleghem, P. A.; Baeten, N., *op. cit.* note 37, p. 1215.

40 *Ibid.*

41 Article 19 (1) TEU; reffred by: Peters, A., *op. cit.* note 5, p. 483.

42 *Ibid.*

the implementation of the European convention on Human Rights, open for the direct access of the individual, the Member States of the Council of Europe have begun to create a unique system of human rights protection.

The first phase of development of the system of human rights protection within the Council of Europe lasted until the adoption of the Protocol XI and was unfavourable for the individuals since there was no possibility of direct application to the Court. Individual petitions had to be assessed before the Commission and only after the Commission carried out the procedure on the merits, the case could come before the Court. The role of the Court in this period was vividly expressed by Frowein, former Vice President of the Commission, describing it as a "*sleeping beauty, frequently referred to but without much impact*."[43]Fortunately, with the entry into force of Protocol XI, the Court has become the main body monitoring the implementation of the provisions of the Convention in the territories of all Member States of the Council of Europe.

Since the individual petition system of the ECtHR has been discussed widely, in this contribution we intend to point to the major characteristic and obstacles faced by not only individuals but also the system itself. It is well known that the human rights system under the auspices of Council of Europe provides protection for around 800 million people in Europe. In time when the national state fails to protect or even breach someone´s rights, the fact that there is a mechanism that challenge the national court´s decision often means the last hope for the individual.

3.2.2. *Direct access to the ECtHR*

According to Article 34 of the Convention, "*any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols*"[44] could refer to the Court directly. Thus, the right to institute proceedings before the Court is not reserved only for the nationals of the Contracting States, but this right belongs to all persons whose rights have been violated by a State Party. The key is a violation of the provisions of the Convention.

It is beyond the scope of this paper to assess both the substantial and procedural aspects of the Convention system regarding the status of the individual before the

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[43] Quoted in: Janis, M. W., *European Court of Human Rights*, International Courts for the Twenty-First Century (ed. Janis, M. W.), Martinus Nijhof Publishers, Dordrecht, 1992, p. 135.

[44] Article 34 ECHR

Strasbourg Court. Therefore, we will make brief reference to some of the most disputable aspects of it.

One of admissibility criteria for submitting the application by the individual to the ECtHR is a victim status. The main reason behind this criteria is to prevent *action popularis* in Court proceedings. However, the concept of victim cause numerous uncertainties. In the case of *Vallianatos and Others v. Greece,* the Court gave an interpretation of the notion of victim stating "*[a]ccording to the Court's established case-law, the concept of "victim" must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act. (...) The word "victim", in the context of Article 34 of the Convention, denotes the person or persons directly or indirectly affected by the alleged violation.*"[45] Thus, in order to lodge an application to the Court, the person has to demonstrate that ether he is directly affected by the measure he is complaining to, or to be able to act as an "indirect victim", the notion that has been thoroughly assessed in the Court´s case-law.[46] In other words, when the direct victim is prevented from accessing the Court, the person that belongs to category of indirect victims may do so.

Former greatest achievement of the Council of Europe, the individual's right to direct protection before the Court, now threatens to become a stumbling block of the entire system. According to the numerous scholars who devoted their work to the assessment of the Strasbourg human rights system, for most of its first 30 years the Court has received only 800 individual petitions per year, mainly due to "ignorance".[47] Over the years, the Court manage to build confidence of the individuals in the system of human rights protection, and according to Professor Cançado Trindade "*has contributed, in its own way, to the gradual strengthening of the procedural capacity of the complainant at international level*".[48]However, the Court´s overload due to numerous individual petitions nowadays largely slows down the process of achieving individual justice. In 2016, for instance, there have been almost 80 000 pending applications.[49] Therefore, the effectiveness of the Court has become a matter of profound debates between legal scholars and prac-

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45 Judgment *Vallianatos and Others v. Greece* (2013) [GC], par. 47.

46 List of cases containing explanation of the notion of „indirect victim" provided in: European Court of Human Rights*, Practical guide on admissibility criteria*, 2014, URL=http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf. Accessed 15 February 2017.

47 Greer, S.; Williams, A., *Human Rights in Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?,* European Law Journal, No. 4, 2009, p. 464.

48 Cançado Trindade, A. A., *The Access of Individuals to International Justice*, Oxford University Press, Oxford, 2011, p. 27.

49 Statistical data available at: URL=http://www.echr.coe.int/Documents/Stats_pending_2016_ENG.pdf. Accessed 15 February 2017.

titioners. The general conclusion is that the ongoing reforms of the Strasbourg system regarding the individual petitions has to be supported by the better implementation of the Convention by national authorities, so that the number of clearly inadmissible applications, or repetitive applications get reduced.[50]

4. CONCLUDING REMARKS

We might conclude this paper with the last though of Professor Spiropoulos in the abovementioned contribution from the 1929: "*Espérons seulement que les efforts conjugués de pensées amies arriveront à hâter l'heure ou l'individu se verra assurer, dans l'ordre international, la place qui répond au développement récent de l'organisation du monde*." Among all aspects of its legal status, the access to justice undoubtedly deserves significant place.

The assessment of the individual´s procedural capacity in the European region, with proposed emphasis to the European Union system, was supposed to point to the basic differences between the systems itself. A striking difference in systems under CoE and EU regarding the individual lies in the nature of the two subjects of international law. CoE imposes rights and duties indirectly and therefore the individual can appeal only after the unsatisfactory solution in the national state, while the EU can impose various rights and duties directly through the activity of its institutions and the secondary law, so there must be an opportunity for the individual to appeal directly to the Court. The second point of divergence lies in the scope of jurisdiction and fields covered by both organisations. While the CoE serves as the best established human rights forum in the international community, the EU embodies primarily economic integration, which has a substantial influence on reasons for which an individual may lodge an application. „*An economic institution must carry out its assigned tasks rather than becoming overly involved with political-type questions. Consequently, a clear sphere of authority is left to the Council of Europe, even though concurrent jurisdiction may arise*."[51]

Despite all the pros and cons inherent to both systems, by observing the global picture of the individual´s position, it is safe to conclude that the individual in Europe has forged the path to the regional justice.

[50] For the assessment of the Court´s efficacy see: Mahoney, P., *The European Court of Human Rights and its ever-growing caseload: Preserving the mission of the Court while ensuring the viability of the individual petition system,* The European Court of Human Rights and its Discontents (ed. Flogaitis, S.; Zwart, T.; Fraser, J.), Edward Elgar, 2013, pp. 18 – 25.

[51] Gormley, W. P., *op. cit.* note 11, p. 158.

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