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## INTRODUCTION

Once upon a time, civil procedure was considered to be a conservative, slow-changing discipline. The texts collected in this book supply proof that this is not the case anymore. From the last decades of the twentieth century – or at least from the publication of a well-known book on comparative perspectives of civil procedure<sup>1</sup> – it became generally accepted that civil justice is in crisis (or, as one of the authors in this book states, on the verge of crisis) and that action had to be taken in order to change this situation. The main issues that needed – and still need – to be addressed are known to all lawyers; civil justice is *slow* and *inaccessible* and the courts are *overburdened*.

This trinity corresponds to the presentation of the topics in this book. *Slow justice* can be addressed in at least two ways: (1) procedural reforms aimed at acceleration of judicial proceedings and (2) a better organization of the litigation process. Both approaches, sometimes intrinsically intertwined and entangled, are discussed in the first two parts of this book, titled ‘Civil Procedure – Improving the Efficiency and Quality of National Justice Systems in Europe’ (featuring texts of Albers, Kiesiläinen, Van Rhee, Oberhammer and Uzelac) and ‘Case Management – Efficiency Through a Better Organization of Judicial Proceedings’ (featuring texts of Ng and Radway). The papers collected in these two parts demonstrate that, both at a national and at a supra-national level, there is a strong conviction that reform of the systems of civil justice is very much needed and that this reform is also feasible (although the means suggested to achieve a positive change may not always be the same).

The second major flaw of many judicial systems today – *inaccessible justice* – is usually associated with specific features of contemporary justice systems. It is often argued that these justice systems are too complex, too expensive and overly formalistic. Possible solutions to these problems can be divided into two categories. The first category contains measures to simplify court proceedings and to encourage courts to adopt a less formalistic approach to civil cases. The second category contains measures aimed at providing legal assistance to those who need to use the

<sup>1</sup> Zuckermann et al. 1999.

civil justice system, for instance, by supporting them in finding necessary information or by providing them with expert legal assistance under favourable conditions. The various approaches in dealing with the limited accessibility of the civil justice systems are well represented in the third part of this book, titled 'Legal Aid and Access to Courts – Efficient Justice for All Users'. This third part of the book features texts by Johnsen/Regan, Hess, Fernhout and Grgić.

Finally, the problem that courts are *overburdened* might invoke thoughts about relieving them of cases that can be more appropriately handled by other methods of dispute resolution. Measures to reduce the burden on courts will be viewed favourably by the judiciary because it creates a better work environment for judges and alleviates the pressure of backlogs. From the perspective of court users it will also be applauded because it allows them, when necessary, to bypass their encounters with public justice systems that are at times remote, hostile, slow and delayed, and resort to an alternative that might better cater to their needs. Currently, one of the most popular private alternatives to overburdened public courts is mediation, especially where it is framed as a separate, private and voluntary method of dispute resolution. Mediation is the topic of the fourth part of this book, titled 'Mediation – Efficiency Through Alternative Dispute Resolution'. The two papers in this part of the book (by de Roo/Jagtenberg and Silvestri) provide a representative crosscut of contemporary issues, insofar they both deal with two main questions: 'What are appropriate cases for alternative dispute resolution?', and 'What are the boundaries of ADR and mediation?'

This book is the result of an annual international, interdisciplinary and interactive postgraduate course initiated two years ago at the Inter-University Centre in Dubrovnik. The central theme was 'the analysis of the role and functioning of the law and its institutions as mechanisms for the regulation of social conflicts in present-day Europe'.

The contributors to this book come from different corners of Europe, from Norway to Italy, from the Netherlands to Croatia, and from Switzerland and Austria to Finland and Germany. They also come from different professional backgrounds. The book they have produced is not only or mainly an academic product of distinguished scholarship, but also offers various perspectives from legal practice. This is not a surprise, since many of the authors are experts, advisors or delegates in international bodies, barristers, mediators, legal aid providers, judges, *rapporteurs*, arbitrators and case managers (sometimes with several of these qualities embodied in the same person). The common denominator that was sought by the editors was to collect works of solid scholarship that offer good, first-hand insights into the way civil justice functions in practice in a European context.

The present book does not only present richness in diversity. Due to a fortunate series of coincidences, it also has a single *Leitmotiv*. This *Leitmotiv* is the process of change of civil procedures in Europe, civil procedures that originally were often based on the procedural *ius commune* of the pre-codification period. This change is mainly the result of developments in the twentieth century, a century that started to question some of the values of the traditional approach to civil justice. One of the

main themes that emerged was that the opposition between quality and efficiency may ultimately appear to be artificial.

In the discourse about the transformation of contemporary civil justice systems, the *internationalization of national civil procedure* is one of the main themes. In our opinion, *internationalization* is not primarily about the fact that the integrative processes in Europe produce more and more rules that apply directly in the national jurisdictions of, for example, the EU Member States. Such direct applicability may be important, but, in our opinion, the indirect impact of these rules on the development of national rules and practices is much more important. Today, there is hardly a European state that does not attempt to construe its national rules and practices of procedural law in light of Article 6 of the European Convention of Human Rights as the paramount norm of a pan-European 'due process of law'. Similarly, although for the time being less pronounced, the principles and minimum standards used in the area of cross-border disputes may have a spill-over effect on the development of the domestic justice systems (for instance, the EU rules concerning a European enforcement order, a European order for payment, a European small claims procedure, etc.). Therefore, it is only logical that several papers in this book discuss the development of the practice of the European Court of Human Rights (Fernhout and Grgić) and recent developments in the European Union (Hess).

An internationalization of the various national civil procedures also occurs due to the increased relevance of comparative procedural research. The common experience of 'civil justice systems in crisis', as well as the creation of 'an area of justice, liberty and security in Europe' have considerably raised the interest for the functioning of other national justice systems, for instance, for the purpose of inspiring local reform efforts. Phrases such as 'best European practices' and 'in conformity with European standards' have been reiterated so many times and on so many different occasions, that they almost lost their meaning. Today, it is impossible to be an expert of national procedural law without having at least basic knowledge of comparative law (and of comparative legal history). The papers of Kiesiläinen, Van Rhee and Oberhammer/Domej show how some of the most developed civil justice systems of Europe (Finland, the Netherlands, and Austria) continue to change, often relying on developments in other countries (Sweden, England) or by redefining successful historical models and paradigms (such as the *Zivilprozessordnung* of Franz Klein). From a different perspective, Uzelac discusses how less positive procedural practices develop, suggesting strong remedies mainly derived from comparative legal research. These remedies might help overturn the deeply rooted systemic dysfunctions of 'Mediterranean civil procedure'.

The most important development as regards comparative research into the functioning of European judicial systems is the establishment of the European Commission for the Efficiency of Justice (better known by the acronym of its French name, the CEPEJ), established on 18 September 2002 by the Council of Europe. The mandate of the CEPEJ is to analyse the results of the various judicial systems of the Member States of the Council of Europe, to identify the difficulties these systems encounter, to define concrete ways to improve them, and to evaluate the functioning of these systems. Although the CEPEJ is not the only body concerned with the administration of justice within the Council of Europe, and although it has lived, to

a certain extent, in the shadow of the older and richer bodies established by partial agreements – the GRECO and the Venice Commission – today, the CEPEJ may well be considered to be the most innovative international forum of its kind. Special features distinguishing the CEPEJ from other bodies and organizations are its broad mandate, its expert knowledge, and its close co-operation with the governments of the 47 Member States of the Council of Europe. In a short period – less than five years – it was possible to achieve something, which, for a long time, seemed impossible to European scholars and networks of researchers devoted to current issues of the administration of justice. On the one hand, the CEPEJ has achieved – at least in certain areas – the dream of every legal comparatist: completeness and accuracy of collected data, topped by an emerging ability to compare individual data in their development over a period of time (see the paper of Albers in this volume). On the other hand, the CEPEJ has realised the eternal ambition of many researchers, an ambition that is almost always present, but almost never fulfilled: in only a few years, the work of the CEPEJ has achieved political relevance. When the first reports of the CEPEJ were published in 2004, some of the figures they contained were eagerly discussed by the press, professional associations and the highest public officials of several Council of Europe Member States.

Monitoring or ranking of justice systems is not part of the work of the CEPEJ. Its reports are ‘theory-free’ (if not entirely ‘value-free’). The CEPEJ, limited by its statute and mandate, as well as by its composition and position within a political organization, is certainly not fully free in the interpretation and presentation of its findings and its recommendations. This makes a scholarly analysis of its work and the supply of a follow-up to its activities in academia and beyond important. This should occur in an atmosphere of frank and serious debate among experts, with scientific rigour in the absence of political concerns.

The post-graduate course of which this book is the result and which took place from 28 May until 1 June 2007 at the Inter-University Centre Dubrovnik had precisely this very ambition. The texts presented in this book are the direct product of the lectures, reports and discussions during the course. It is important to note that various contributors to this book are involved in the work of the CEPEJ. Two of them (Albers and Uzelac) were among the ‘founding fathers’ of the CEPEJ. They were among the drafters of Resolution (2002)12 by which the CEPEJ was founded. In addition, they drafted subsequent CEPEJ reports and documents. They also served as members of the Bureau of the CEPEJ, and presided for almost four years over two out of its three initial working groups. Others, such as Jon T. Johnsen and Nina Betetto (who participated in the course and who published a report in an earlier volume resulting from the 2006 Dubrovnik course)<sup>2</sup> were active members of CEPEJ’s working groups. They initiated some key reports, to which they also contributed (see, for instance, the CEPEJ report on judicial time management in northern Europe, which would not have been possible without the expert knowledge of Professor Johnsen). Other authors of this book, such as Hess and Jagtenberg, were engaged by the CEPEJ or the Council of Europe as key experts, supplying their

<sup>2</sup> Uzelac & Van Rhee 2007.

reports to the Commission on various issues (for instance, territorial jurisdiction or mediation). Some other participants of the Dubrovnik course were also deeply involved in the CEPEJ activities, such as John Stacey (current Vice President of the CEPEJ), Klaus Decker (who was a regular observer at the CEPEJ on behalf of the World Bank) and Mario Vukelić (CEPEJ's national correspondent for Croatia). The course, as well as several texts in this book, profited considerably from their interventions and insights.

It seems that the key for the reader to interpreting the subtitle of this book ('From *ius commune* to the CEPEJ') is the development of civil procedure in a Europe that has changed considerably. The starting point was the Europe of the *ius commune*, a relatively disunited Europe in which the common features of the national civil procedural laws could be found in a reliance on the Romano-canonical procedure and guiding principles from the past (*dicta et regulae iuris*), as described in the 'Post Scriptum' and last part of this volume (Petrak). The contemporary influence of this 'old Europe' on civil justice should neither be ignored nor underestimated. But, the 'new Europe' of united standards and principles requires more than that - a conscious and active comparison and analysis of justice systems, such as those initiated by the CEPEJ and undertaken by practically each and every contribution to this volume. However, one should not forget about the past and, therefore, both the starting point and the final destination of this volume - the old *ius commune* and the CEPEJ - will continue to exert their influence when building procedural laws and practices for a 'new Europe'.

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