

A. Uzelac and C.H. van Rhee (eds.)

Access to Justice and the Judiciary. Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication

77



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Access to Justice and the Judiciary

A book series devoted to the common foundations of the European legal systems. The *Ius Commune Europaeum* series includes comparative legal studies as well as studies on the effect of treaties within national legal systems. All areas of the law are covered. The books are published in various European languages under the auspices of METRO, the Institute for Transnational Legal Research at Maastricht University.

'Access to justice' is among the most important notions in modern legal vocabulary. It is a central topic in the famous book series edited by the late Mauro Cappelletti, the case law of the European Court of Human Rights, the land-slide reforms of Lord Woolf in England and the reform of most other modern justice systems. From all these sources one general line of thought emerges: every individual deserves legal protection that is not only quick, but also effective and affordable.

In a time when an ever growing demand for justice meets economic crisis and shrinking resources, innovative approaches to access to justice are urgently needed. The present volume discusses a variety of such approaches from across Europe (and beyond), all united by their significance in contemporary trends in legal and judicial reform. They are presented in the four sections of this book:

1. Access to Justice and Legal Aid;
2. Accessibility by Improvement of Quality;
3. Access to Justice Through Mediation and Arbitration; and
4. Accessing Justice Through Efficient Enforcement.

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C.H. van Rhee

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Editors:

A. Uzelac

C.H. van Rhee

Editorial Advisory Board:

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LIST OF CONTRIBUTORS

Pim Albers, Special Advisor of the European Commission for the Efficiency of Justice (CEPEJ), Council of Europe; Former President of the CEPEJ-GT-EVAL and Former Member of the CEPEJ Bureau; Senior Policy Advisor, Strategy Department for the Administration of Justice, Ministry of Justice, The Hague (Netherlands)

Tanja Domej, Senior Research and Teaching Associate of Civil Procedure, Enforcement and Insolvency Law, Faculty of Law, University of Zurich (Switzerland)

Fokke Fernhout, Associate Professor of Civil Procedure, Faculty of Law, University of Maastricht (The Netherlands)

Giuseppe Finocchiaro, Associate Professor of Civil Procedure, School of specialisation for legal professions, Faculty of Law, University of Brescia (Italy)

Dirk Heirbaut, Professor of Legal History and Roman law, Faculty of Law, Ghent University (Belgium)

Rob Jagtenberg, Associate Professor of Comparative Law, Faculty of Law, University of Rotterdam (Netherlands); General Rapporteur on the subject of mediation, Council of Europe

Jon T. Johnsen, Professor at the Department of Public and International Law, Former Dean of the Law Faculty of the University of Oslo (Norway); Former Member of the CEPEJ's Task Force for Timeframes of the Judicial Proceedings (TF-DEL) and Member of the SATURN Centre for judicial time management of the CEPEJ

Ana Keglević, LL.M., Assistant at the Chair of Civil Law, Faculty of Law, University of Zagreb (Croatia); former manager at the Permanent Arbitration Court attached to the Croatian Chamber of Commerce in Zagreb

Maja Mitrović, Trainee at the County Court in Zagreb (Croatia), Postgraduate student, Faculty of Law, University of Zagreb (Croatia)

Svetozara Petkova, Attorney-at-Law, Sofia, Bulgaria; Rule of Law consultant for the World Bank and the United States Agency for International Development (USAID)

Iva Pushkarova, Consultant for the World Bank, Lecturer in criminal law at Sofia University 'St. Klement of Ohrid', Legal Researcher on organised crime at the Risk Monitor Foundation, Sofia (Bulgaria); Executive Director of the Bulgarian Judges Association

C.H. (Remco) van Rhee, Professor of European Legal History, Faculty of Law, Maastricht University (Netherlands)

Vesna Rijavec, Head of the Institute for Civil, Comparative and International Private Law, Faculty of Law, University of Maribor (Slovenia)

Annie de Roo, Associate Professor of Law, Faculty of Law, University of Rotterdam (Netherlands); Accredited Mediator (NMI); Key Expert in the CILC Project on Labour Dispute Conciliation in Croatia

Alan Uzelac, Professor of Civil Procedure, Faculty of Law, University of Zagreb (Croatia); Former Croatian delegate in the CEPEJ; Former President of the TF-DEL; Former Member of the CEPEJ Bureau; Member of the SATURN Centre for judicial time management of the CEPEJ

Introduction

The words 'Access to Justice' will not only remind every jurist interested in comparative civil procedure of a fundamental principle of procedural law, but also of the project and book series initiated in the 1970s by the late Professor Mauro Cappelletti from Florence, the past president and the co-founder of the International Association of Procedural Law. The first volume of the series was published in 1978, and its foreword starts with an observation still relevant today:

'There is some agreement among legal and political scientists that the difference between classical 'liberalism' and modern democracy must be seen as the difference between 'negative' and 'positive' liberty - i.e., between liberty merely for those who are by themselves able to make use of the economic, political and legal institutions, and an affirmative effort by the state to make liberty accessible to all'.¹

It is this observation, which formed the point of departure of the third Dubrovnik Course on Public and Private Justice of May 2008, of which the present volume is the final product. The relevance of the statement especially, but not only, for Central and Eastern European countries cannot be underestimated.

The notion of access to justice has developed significantly in the past decades. Now, more than ever, this notion has to be interpreted broadly. The most representative indicator of the fields to which the term 'access to justice' relates and the development of its modern understanding can be found in the case law of the European Court of Human Rights. After the famous *Golder*² case, in which access to justice was confirmed to be among the most fundamental guarantees of the right to a fair trial of Article 6 ECHR, the Court has gradually expanded its use to new areas. At first, it was meant to denote everyone's right to legal protection by an independent and impartial tribunal for all disputes regarding civil rights and obligations. This right had to be effective and practical, and not elusive and illusory. This meant, *inter alia*, that the judicial process had to be affordable to its users. For this, *the costs of legal protection* and the methods in which these cost are being paid is crucial. In particular, the costs of legal representation by professionals (lawyers, attorneys, solicitors) and their formation may have a decisive effect on the practical possibility to realize everyone's right to access to justice. Consequently, as the Strasbourg

¹ Cappelletti & Garth 1978, p. vii.

² *Golder v. UK*, 4451/70, judgment of 21 February 1975.

Court found in the *Airey*³ case, access to justice implies the obligation of the state to provide legal aid facilities not only in criminal cases (where this is expressly provided), but also in civil cases. Thereby, *effective legal aid systems* are part of the core areas of the right to access to justice.

Yet, access to justice can only be fully realized if the product for which is being paid is of appropriate quality as well: no matter how the funding of the legal process is organised, the process itself has to adhere to sufficiently established *standards of quality*. As confirmed by an endless line of judgments of the European Court of Human Rights on violations of the right to a fair trial within a reasonable time, no state can successfully legitimize slow, ineffective and distorted justice by 'objective difficulties' related to the lack of funds, resources or well-trained staff. Therefore, many European countries aspire today – with relative success – to improve their justice systems and deal with their systemic problems by introducing uniform standards for measuring quality, by harmonizing procedural practices, and by reforming the recruitment and training of judges and other legal professionals.

In its early decisions, the European Court of Human Rights ruled that access to justice is not an absolute right, and that it can be waived. However, as emphasized in the *Deweer*⁴ case, every waiver of the right to access to justice is subject to careful scrutiny of the Court, ensuring that the waiver is clear and unequivocal, and expressed freely, without any undue influence. Today, more and more traditional court-users tend to wave their right to a formal state adjudication of their claims in favour of informal and private mechanisms of dispute resolution – *mediation and arbitration*. As these alternative methods of dispute resolution grow becoming less of an alternative and more of a standard in a number of particular areas, they are viewed from a different perspective: they are increasingly perceived to be equally valuable as state organized adjudication processes, as supplementary methods of access to justice, rather than as singular, tolerated waivers of access to justice guarantees.

Finally, in the past decade the European Court of Human Rights has extended the notion of access to justice to *effective enforcement of judicial and extra-judicial documents*. In the *Hornsby*⁵ case, it was stated that access to justice 'would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party'. In subsequent decisions, the Court extended the application of Article 6 to enforcement of all enforceable deeds and documents. Thus, it is today inconceivable to speak about access to justice without taking into account the mechanisms aimed at the enforcement of all legally recognized claims.

The papers in this volume follow the logic of the described development. They are divided into four sections: (1) Access to Justice and Legal Aid, (2) Accessibility by Improvement of Quality, (3) Access to Justice through Mediation and Arbitration, and (4) Accessing Justice Through Efficient Enforcement.

³ *Airey v. Ireland*, 6289/73, judgment of 9 October 1979.

⁴ *Deweer v. Belgium*, 6903/75, judgment of 27 February 1980.

⁵ *Hornsby v. Greece*, 18357/91, judgment of 19 March 1997.

Section 1 on legal aid starts with a contribution by *Fokke Fernhout* (Maastricht). The author discusses various types of outcome-related lawyers' fees (also known as contingency fees), all of which are aimed at making it more feasible for litigants to take their case to court without government supported legal aid schemes. The author distinguishes four main types of contingency fees: (1) 'no cure no pay', (2) 'no win less fee', (3) '*quota pars litis*', and (4) 'success fee' (uplift above the ordinary fee).

In many parts of the world, outcome-related fees have, for a long time, been viewed as unacceptable since they result in counsel obtaining an interest in the outcome of the litigation. This was thought to influence his neutrality, which meant that he would not be the objective legal representative he was (and is) expected to be. However, this approach resulted in a situation in which publicly funded legal-aid schemes had to be relied upon in a large number of cases in order to provide litigants with access to justice. The growth of the number of litigants claiming benefits under such schemes made adhering to this approach impossible and has forced governments to reconsider their views with regard to contingency fees. Fernhout's contribution offers a short analysis of the debate and an overview of the rules on outcome-related fees in some Western European Countries and Hong Kong. The latter country has developed a highly innovative approach to contingency fees, allowing a supplementary legal aid fund to take on specific cases on the basis of such fees. Fernhout's conclusion is that countries with a prohibition of contingency fees need to reconsider their regulations on lawyers' fees. From the perspective of the EU, this is not a problem according to the author since regulations on lawyers' fees emanating from or controlled by EU Member States are in his opinion compatible with EU law.

The next two contributions in Section 1 by *Jon Johnsen* (Oslo) and *Iva Pushkarova* (Sofia) deal with more traditional methods facilitating access to justice for litigants. Johnsen focuses on vulnerable groups in the legal services market. The author discusses the advantages and disadvantages of so-called 'judicare schemes'. In these schemes governments use the private professions for providing public legal aid. The author focuses on the reasons why market mechanisms do not function well with regard to legal services, both from the perspective of legal service providers and buyers. He discusses, amongst other things, the asymmetric understanding of legal services by buyers and providers and suggests possible solutions for this problem (warranties, service tests, professional responsibility, reputation) and alternatives to the existing judicare schemes (legal insurance, mixed models of providing legal services, the role of NGOs and salaried lawyers, tendering or auctioning out legal service commissions). The contribution concludes with indicating what can be gained from them.

In the light of the shortcomings noted by Johnsen, it becomes worthwhile to investigate existing, successful access-to-justice models. According to *Iva Pushkarova*, various examples may be mentioned. The author discusses England & Wales, Chile and Lithuania and subsequently makes some remarks on her home country, Bulgaria.

England & Wales is described as the world leader in legal aid spending per capita and legal aid quality. In the majority of cases of this jurisdiction legal aid is provided by legal practitioners. Due to an increased demand and high costs, the late 1990s witnessed a decrease in the availability of publicly funded legal aid and the introduction of a prioritization scheme, allowing cases to be funded on the basis of their perceived public interest. (As is shown in Fernhout's contribution, 'success fees' are now also allowed.)

In addition to the English legal aid scheme, Iva Pushkarova regards the Chilean and Lithuanian schemes as successful. Chile has introduced regional corporations for judicial assistance providing a wide range of legal services. Apart from maintaining a system of mandatory apprenticeships for law graduates, they provide for clinical legal services to the poor. The Chilean example has been influential in Central and Southern America.

Lithuania has adopted a centralised institution for legal aid management. Legal aid lawyers receive a fee per case, varying according to case complexity. The new legal aid system in Lithuania combines elements of the former Lithuanian scheme of panel-appointed private lawyers with a system of in-house public defenders.

The above examples inspired Bulgaria to introduce a new legal aid scheme in 2006. A central legal aid management entity (National Legal Aid Bureau) has been established in this country within the Ministry of Justice. This National Legal Aid Bureau, amongst other things, funds and promotes legal aid. Legal aid in Bulgaria is provided by registered legal aid lawyers who are subject to a system of quality control. For each case a lawyer is appointed by the local bar association on the basis of a fixed remuneration per type of case.

Section 2 of the present volume is devoted to access to justice by improving the courts, the administration of justice and the rules of civil procedure.

Measuring the quality of courts and the administration of justice according to quality criteria is a very recent phenomenon. It is the result of a more critical approach towards the judiciary and state-provided services, and has been inspired by similar developments in the area of industrial production and commercial activities in general. In his contribution to the present volume, *Pim Albers* (Strasbourg) discusses quality assessment, quality assurance, quality management and 'excellence models'. The author gives an overview of the history of quality models and quality measures that have been - or will be - used by courts in various parts of the world. Traditionally, judges have only focused on the quality of judicial decisions from a purely legal perspective, but according to Albers a more comprehensive approach is needed. Other quality aspects need to be taken into consideration, such as the duration of lawsuits and the treatment of parties by the court. In this respect, some highly interesting quality measurement schemes have been introduced in various countries across the globe. Albers discusses the US Trial Court Performance Standards, the Singapore eJustice Scorecard, *Rechtspraak* in the Netherlands and Quality Benchmarks in Finland. In addition, the author also analyses initiatives taken within various European frameworks, e.g. the Costa Report of the European Parliament (EU), the European Network of Councils for the Judiciary and the

Quality Topics of the CEPEJ (Council of Europe). On a world-wide scale, the Consortium of Court Excellence is mentioned.

Within Section 2, we also find two contributions that concentrate on the improvement of quality by more traditional means, i.e. the introduction of new procedural rules and their amendment. The first contribution by *Tanja Domej* (Zurich) on the unification of civil procedural law in Switzerland is followed by an historical overview of attempts to reform the law of civil procedure in Belgium, written by *Dirk Heirbaut* (Ghent).

Tanja Domej starts her contribution with defining factors that make a procedure efficient. In her opinion, an efficient procedure regulates the communication between the participants in the litigation process in such a way that the court is enabled to reach a correct decision within a reasonable time. The author contends that it is from this perspective that the efficiency of the rules encompassed by the new, unified Swiss Code of Civil Procedure should be viewed. This Code was adopted by the federal Swiss legislator on 19 December 2008 (i.e. after Dr. Domej submitted her article for publication) and is set to come into force on 1 January 2011 replacing the current 26 cantonal codes.

A first question that may be asked is whether the Swiss unification project may be viewed as a boost for efficiency. In the author's opinion, this is questionable, partly because court organization and funding remain a prerogative of the Swiss cantons. Secondly, one may ask whether rules in themselves can actually contribute to efficiency, since it is not so much the rules but their interpretation and application that are crucial. According to the author it is questionable whether the new Swiss code will increase efficiency, even if one disregards these two issues. Although the Swiss judge may have obtained larger powers as regards the formal aspects of litigation under the new legislation, the Swiss approach as regards the powers of the judge in respect of the substantive aspects of the case is conservative and not in line with mainstream developments in Europe and beyond. The only exception to this rule can be found in what the Swiss qualify as 'social civil procedure', where indeed the judge may also be active as regards the content of the case. Meanwhile, the approach taken with regard to new allegations and new evidence is more in line with modern European developments, as far as the aim to enable the court to obtain a good view of all relevant aspects of the case at an early stage in the litigation process is concerned. The relevant rules, however, pay little attention to the relationship between the powers of the judge in respect of the substance of the case and the parties' duties to make their allegations on time. Therefore, it will be up to the courts to ensure that the strict rules on new allegations do not lead to similar detrimental effects as those familiar from the history of the 'Eventualmaxime'.

Concern about efficient civil procedure rules is not a recent phenomenon. It is most likely as old as civil litigation itself.⁶ In the second half of the nineteenth century, it was high on the agenda in Belgium and this has remained so ever since. However, the Belgian experience may, according to Dirk Heirbaut, be qualified as an *unsuccessful* quest for greater efficiency. The author claims that this is due to the

⁶ Cf. Van Rhee 2004.

fact that even though Belgian civil procedure is a successor of the late Roman *cognitio* procedure, it did not adopt the powers that were attributed to the judge in this procedure, but copied those features of the medieval romano-canonical procedure which allowed the parties to dominate the litigation process.

A first attempt at increasing the powers of the judge in Belgium dates from the 1870s. At that time, a new civil procedural code was drafted by Alberic Allard. Heirbaut claims that although Allard was a brilliant lawyer, he did not have the right political instinct to make his draft adopted. He did not realize that in the end he would need the support of the practitioners he attacked in his draft. Consequently, his draft remained a draft.

It was only in the 1960s that new attempts were made in Belgium to replace the French code with a Belgian code. This time, the attempts were successful, resulting in the Belgian Judicial Code of 1967, which has been applied since 1970.

Looking back, the code was not a success. According to Dirk Heirbaut, this is mainly due to the fact that the code came too early, i.e. before the world-wide access to justice movement from the 1970s, and also because in the end the text of the code itself was not strictly observed as judges continued their old practices. The failure may also have been the result of the apparent lack of attention to foreign jurisdictions that had introduced an efficient procedural system such as Austria. As a result, under the Belgian Judicial Code the judge did not become active, the possibility and scope of the appeal remained very broad, and the principle of party autonomy dominant.

Some improvements may be noted in the last decade or so. Apart from amendments to the Judicial Code that have increased the powers of the judge, Belgium has introduced a High Council for the Judiciary with the aim of – amongst other things – ending the unofficial practice of appointing judges on the basis of political considerations (political appointments). The latest generation of judges is selected on the basis of their merits and quality and it is likely that these more competent judges will be able to make effective use of their increased powers in the litigation process.

The fact that in the selection of judges one should focus on quality is raised in the last contribution of Section 2 by *Giuseppe Finocchiaro* (Brescia). Selection, but also training has been targeted by the Italian legislator for several decades now, albeit, as it seems, without much success. The author describes the Italian system of training and selection in the past and the present which – at least in the eyes of a Northern European observer like the second editor of this volume – appears to be a wonderfully baroque structure doomed to fail due to its complicated and rather unclear nature. Central in the author's contribution is the new Law on the Organic Reform of the Judicial System, which lays down the requirements for entering the Italian judiciary and career progress. Occasionally, the new rules appear to be contradictory, and there are various ways to qualify for the required exams which seem not to be properly thought out, to say the least. The nightmarish organization of the exams themselves appears highly problematic. Finocchiaro's contribution is illustrated with a wealth of statistical data which highlights the main points made by the author.

Access to justice may not be achieved by effective legal aid schemes and/or contingency fee systems only, or through high quality civil procedure rules and training, and selection processes, but also by enabling people to solve their disputes out-of-court and thus taking away the need for a day in court. Of course, in the light of, e.g., Article 6 ECHR such alternative dispute resolution mechanisms may not prevent litigants bringing their case before state courts, but especially on a voluntary basis such schemes may be beneficial by taking away the need for litigation (as stated above, the right of access to justice may be waived). Consequently, Section 3 of the present volume pays attention to two popular types of these mechanisms: Mediation and Arbitration. Mediation is discussed by *Annie de Roo & Rob Jagtenberg* (Rotterdam) and, for divorce cases, by *Maja Mitrović* (Zagreb). The third contribution in this Section by *Ana Keglević* (Zagreb) discusses arbitration.

De Roo & Jagtenberg examine the interrelationship between mediation and in-court adjudication, or between private and public justice. They start their article by stating that within the context of their contribution, mediation can be defined as a structured process whereby a qualified mediator assists the parties, using his wealth of professional knowledge. This excludes mediation as a side-activity. Within modern mediation, just as in modern litigation before state courts, accountability, accessibility and efficiency are key issues. Accountability concerns the question whether private mediators should be held accountable towards their clients and whether this accountability also concerns the quality of their services. Accessibility focuses, amongst other things, on the lack of knowledge of mediation as an alternative to court proceedings, not only with the general public but also with professional lawyers. Additionally, it concerns the fees charged by mediators. Finally, efficiency issues do not only arise where from a state perspective the costs of mediation are lower than litigation, but also where litigants may obtain a final settlement of their dispute for a lower price.

The judge may play various roles with regard to mediation. He may be the referring authority when he refers the parties to a mediator after they have brought their case to his attention, but he may also act as a reviewing authority, e.g. when the settlement is brought to his attention by a party claiming that it is defective. In each of these roles, accountability, accessibility and efficiency are again key issues which the authors discuss in depth.

Maja Mitrović discusses mediation in divorce cases in Croatia, albeit within a wider European context. She comes to the conclusion that the present Croatian mediation scheme in such cases is unsatisfactory. First, it appears that 'mediation' in Croatian divorce cases can better be qualified as 'conciliation'. In actual fact, the proceedings described by Mitrović remind lawyers familiar with the tradition of the French Civil Code of a type of conciliation which has been abolished in most states influenced by that Code and which was aimed at reconciling the spouses. In the Netherlands, for example, this meant that spouses had to make several subsequent appearances before the court for reconciliation attempts. It is this type of 'mediation' which Mitrović finds to be in contravention to Article 6 of the ECHR since it effectively denies the parties access to court, at least, if reconciliation has not been attempted. On the basis of several European initiatives, the author argues that

Croatia needs to change its laws in this respect in order to bring them in line with European standards.

Anna Keglević discusses international commercial arbitration as an alternative to court proceedings. The author focuses on the main duties of the arbitral tribunal and the parties to arbitration proceedings. The duties of the arbitration tribunal can be divided into specific duties imposed by the parties, duties imposed by Law (e.g. impartiality and independence, duty of disclosure, duty to act with due diligence and due care), and ethical duties. The duties of the parties are various: examples are the duty to select the arbitrator(s), duties related to party autonomy, and the duty to pay fees and expenses. Since it are these duties that shape the arbitral proceedings, which is decisive for the question whether or not parties will opt for arbitration as a means of access to justice, they justify the thorough discussion that is provided by the contribution by Keglević in the present volume.

The final part of this volume (Section 4) addresses enforcement. Effective enforcement is a necessary part of any discussion on access to justice, since without the possibility of effective enforcement of court decisions, access to justice is futile. Especially in states in transition in Central and Eastern Europe, efficient enforcement mechanisms are a recent phenomenon. Two successful schemes are discussed in the present volume, those of Bulgaria and Slovenia. Both countries have opted for a certain measure of privatization of enforcement.

Svetozara Petkova (Sofia) discusses the introduction of private enforcement agents in Bulgaria. Traditionally, just like in most European countries, enforcement agents, i.e. bailiffs, whether operating on a private, public or semi-public basis, had a bad name. The author states that in Bulgaria bailiffs were considered to have the lowest status amongst legal professionals, a position they shared with their Dutch counterparts who were even described as the 'least esteemed figures within humanity' in the 1930s.⁷ In Bulgaria, enforcement agents were originally state appointed officials. Their efficiency and success rate was, and still is, rather low. However, the Bulgarian legislator hesitated when it was suggested that private enforcement agents should replace their state appointed counterparts. Consequently, the present Bulgarian system knows both types of agents. Svetozara Petkova states that by now it is clear that private enforcement agents are more effective and efficient than their state appointed counterparts. At the same time, it does not seem that this effectiveness is achieved on the basis of an abuse of powers, at least not when the complaints statistics are taken into consideration: the number of complaints against private enforcement agents is low.

Finally, the contribution by *Vesna Rijavec* (Maribor) discusses the recent reforms in the Slovenian system of civil enforcement, especially enforcement of money claims secured by pledge (*pignus*) or mortgage (*hypothec*). Slovenia differs from Bulgaria in that it has introduced a mixed enforcement system, in which courts and private enforcement agents are jointly involved in the enforcement proceedings.

⁷ Korporaal 1939, p. 5.

The Slovenian law of enforcement is still in a process of change. However, various improvements have been introduced during recent years. Apart from the introduction of private enforcement agents, exemptions from enforcement of judgment debtors have been removed, provisional measures were further developed, and some changes were introduced with regard to the enforcement of titles originating in other EU Member States. These changes and the ones to come, will most likely foster confidence in the Slovenian enforcement system, and confidence in the legal system is of course a necessary part of all measures aiming to provide access to justice.

As it can be seen in the overview presented above, the contributions to the present volume address a large selection of issues that are relevant to the perspective of access to justice in the twenty-first century. Many of the themes are, however, not new, since they were already on the agenda of the access to justice movement in the 1970s. However, the challenges are different in our modern age, since the world has changed dramatically since the 1970s. We are currently living in a world that is much more globalised than 40 years ago, in which the Socialist experiment has ended and most former Socialist states have embraced the market economy as the way forward, and in which the financial crisis, which few observers would have anticipated when the 2008 Dubrovnik Course on Public and Private Justice took place, is changing our economies and ways of life to an extent which cannot be predicted at the current juncture in history. With an ever growing number of citizens demanding access to justice and shrinking resources, innovative approaches to access to justice are needed. The editors of this volume are convinced that some very relevant ideas are provided in the subsequent pages.

A. Uzelac
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C.H. van Rhee
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