

Slovenian Civil Procedure in the age of Covid-19

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Starting with mid-March 2020, as a response to the coronavirus outbreak, Slovenia has found itself in an almost complete lockdown. The courts have been no exception. On the contrary, while the universities were the first institutions that shut their doors for face-to-face education, the courts of law were the next to follow.

The Immediate Response: A Lockdown of Courts and a Suspension of Proceedings

The existing legal basis in Article 83.a of the Courts Act (*Zakon o sodiščih*), which sets out rules concerning the operation of the courts in case of extraordinary circumstances such as natural catastrophes and large scale epidemics, enabled for such swift response.. The power to determine that extraordinary circumstances have come into existence, is vested with the President of the Supreme Court, who may act upon a proposal by a minister of justice. In casu, the President of the Supreme Court has issued such decree on 13 March 2020.¹ Extraordinary measures may be in place for two months at most (but can be prolonged by a new decree).

The law provides that in such case, the courts cease operations, except in 'urgent matters', as defined in Art. 83 of the Act. Insofar relevant for civil cases urgent matters are considered to be applications for provisional/protective measures, securing evidence and adopting restraining orders, proceedings concerned with enforcement of child custody and maintenance matters, compulsory commitment of psychiatric patients, as well as insolvency proceedings. Except in urgent cases, oral hearings are not held, procedural deadlines are suspended and judicial documents are not served.

The operation of the courts in the case of extraordinary circumstances can be compared with the 'court recess' (*sodne počitnice*) in the period of 15 July – 15 August (Art. 83 of the Courts Act). In regard to ordinary civil litigation, this means that proceedings come to a complete halt; not only are there no oral hearings, but there is no exchange of written documents and briefs, no preparatory measures may be adopted, regardless of whether they would concern only procedural acts in writing. Judicial documents are not served and if they (by mistake) are, procedural deadlines start running only after the extraordinary circumstances are proclaimed to have ceased to exist. Procedural deadlines that started running already before 13 March 2020 (thus before the decree on proclamation of the extraordinary circumstances came into force) do not run and will continue running once the extraordinary circumstances are proclaimed to be over. This is an important detail which distinguishes the consequence of a proclamation of extraordinary circumstances (the same applies to court summer recess) from the suspension of proceedings *ex lege* pursuant to Art.

¹ *Odredba o posebnih ukrepih zaradi nastanka pogojev iz prvega odstavka 83.a člena Zakona o sodiščih. Su 315/2020 of 13 March 2020.*

205 Civil Procedure Act. If proceedings are suspended within the meaning of the Civil Procedure Act (e.g. if the court ceases operations, due to a war or other extraordinary circumstance), the deadlines, which were suspended, would start running anew (thus from the start) once the suspension of proceedings is lifted. Yet, suspension of proceedings pursuant to Art. 205 CPA was (fortunately) not an option, since the extraordinary circumstances of the coronavirus outbreak were not of a such nature, that would require the courts to fully stop operations.

Following the aforementioned decree of the president of the Supreme Court, a special legislation concerning the functioning of the justice system in the era of Covid-19 was adopted (*'A Law on temporary measures in judicial, administrative and other public matters in order to damage control of the spreading of the SARS-CoV-2 (COVID-19²)'*) and it came into force on 29 March 2020. In regard to civil matters, the law did not bring anything new. It confirmed that all deadlines (except in urgent matters) – substantive and procedural – are suspended and that they will continue to run after the measures determined by the Law will expire. The measures are allowed to stay in place until 1 July 2020 at latest. Further measures affecting certain types of civil cases (enforcement of judgments and insolvency proceedings) can be found in legislation that has addressed the consequences of the Covid-19 outbreak for the economy (the so called *'Corona Mega-Law'*).³

Art. 83a of the Courts Act authorises the President of the Supreme Court with the power to further limit the list of urgent procedures. For that reason, a new decree of the President of the Supreme Court was issued on 31 March 2020 further limiting the list of urgent matters and thus further tightening the lockdown of courts.⁴ Most importantly, insolvency matters are no longer considered urgent within the meaning of Art. 83a of the Courts Act, thus no action can be taken in insolvency proceedings until further notice (not even a distribution of funds to creditors in case the debtor's assets have already been sold).

It is further stipulated that all oral hearings in urgent matters are to be held via videoconference, if the technical and spatial conditions are fulfilled. All scheduled hearings in non-urgent matters are cancelled. It is again explicitly stipulated that judicial documents are not served as of 16 March 2020. Except in urgent cases, the parties, their counsel and others are not allowed to enter court buildings, regardless of the reason (e.g. for inspection of the court file).

The second kind of measures relates to ensuring the containment of the virus. E.g. (in urgent cases, where the oral hearings are still held) the judge is authorized to restrict the constitutional right to public trial and exclude public from the oral hearing, if such measure is justified by the need of prevention from the spread of contagious disease and to ensure protection of health and life. All courts have designated single entry points with all

² *Zakon o začasnih ukrepih v zvezi s sodnimi, upravnimi in drugimi javnopravnimi zadevami za obvladovanje širjenja nalezljive bolezni SARS-CoV-2 (COVID-19)*, Official Gazette, No. 36/20.

³ Act Determining the Intervention Measures to Contain the Covid-19 Epidemic and Mitigate its Consequences for Citizens and the Economy; *Zakon o interventnih ukrepih za zajezitev epidemije COVID-19 in omilitev njenih posledic za državljane in gospodarstvo*. Official Gazette, No. 49/20).

⁴ *Odredba o posebnih ukrepih zaradi nastanka pogojev iz prvega odstavka 83.a člena Zakona o sodiščih*. Su 315/2020 of 30 March 2020
http://www.sodisce.si/mma_bin2.php?nid=2020041013584651&static_id=2020033107131032

necessary preventive measures in place. Judges and court staff, except for urgent cases, are ordered to work from home. IT support for enabling effective work from home, such as remote desktop access and secure exchange of large files, is being implemented.⁵

The measures, described above, which brought regular civil litigation practically to a standstill, are adequate insofar they prevented the chaos and undue harsh effects in the initial phase of the nation's lockdown. However, after already more than a month since these measures are in place, critical voices are increasingly raised, most importantly by the Bar Association (and some other professional associations, e.g. of Insolvency administrators). Understandably, a practically total standstill of courts has negatively affected professional operations of numerous law firms. Already on 10 April 2020 the Bar Association has issued a document calling for a gradual opening of courts and for adoption of measures (such as videoconferences and e-service) which would enable a smooth unfolding of all proceedings, not just those which fall under the category of "urgent".⁶ In view of the Bar, the almost total closure of courts and suspension of practically all of their operations (including such that would not require any in-person meetings) until 1 July 2020 disproportionately restricts the Parties' right of access to court and the right to trial without undue delay. The Bar Association also, for good reasons, criticizes the practice of the courts, that no judicial documents are served. This leads to absurd situations that judges, in matters where proceedings are closed, are writing judgments but they may not serve them on the parties' counsel (and thus do not allow them to start working on possible appeals or enforcement measures). Once the extraordinary circumstances are lifted though, there could be a landslide of judgments served on the counsel within a very short time-frame, making it very difficult for them to adequately work on appeals. Formally however, the law is clear: no judicial documents are served in the time of proclaimed extraordinary circumstances.

In response to the objections of the Bar Association, the Supreme Court argues that the deadline of 1 July 2020 is merely the last possible date, and that, circumstances allowing, restrictions could be lifted earlier. Furthermore it submits that a partial closedown of courts is essential in order to prevent court buildings to become epicenters of the virus spreading.⁷

The Forthcoming Task: Toward Electronic Communications, E-justice and More Flexibility in Organizing Proceedings

The courts' closedown and suspending court proceedings (as swiftly implemented in Slovenia) can only be sustainable for a short period of time. This is a very rigid and 'all or nothing' approach. Urgent matters can proceed, whereas all others are totally stopped, regardless of whether at least a part of proceedings could be made in writing and thus without causing any health concerns.

⁵ Strojín G., Slovenia, in: CEPEJ, Management of the judiciary - compilation of comments and comments by country <https://www.coe.int/en/web/cepej/compilation-comments#Slovenia> (last accessed 21 April 2020).

⁶ Lovšin P., Odvetniki pozivajo k odprtju sodišč [The Bar calls for the Opening of Courts], Dnevnik, 10 April 2020. <https://www.dnevnik.si/1042926869>

⁷ Ibidem. See also Lovšin P., Kdaj bodo tudi sodišča odprla vrata [When will the Courts Open Doors], Dnevnik, 21 April 2020.

Alternatives that would enable for a safe, yet smooth unfolding of proceedings, in particular those in the sphere of e-justice along with adequate additional tools for case management, need to be found. There are numerous reasons for this need. The right to a trial within reasonable time for the benefit of litigants in pending proceedings must be guaranteed. It must be prevented, for the benefit of all future litigants, that the backlogs to accumulate during the time of standstill. Third – which also needs to be said openly – it must be ensured to the greatest possible extent that, like in all other sectors of the economy, that jobs and businesses in the legal services sector are not lost.

However, both a legal basis as well as technical infrastructure for a further implementation of e-justice is deficient. E-service of judicial documents and e-filing has long been foreseen in the Civil Procedure Act, however subject to implementation of technical measures. In light of the Lawyers' Associations recent pleas (see supra) however, it has to be reminded that it was precisely numerous lawyers, who persistently lobbied against introduction of effective e-service of judicial documents and e-filing of their submissions in Slovenia. Probably, this is surprising for an outside observer, but not for those, who know how a beloved tool it is for many lawyers in Slovenia to use avoidance of service as a dilatory tactic. On the other hand, E-service and e-filing has already been successfully implemented in certain specific fields, like 'enforcement based on a trustworthy document' (in essence, a kind of payment order procedure), land register proceedings and insolvency.

The legal basis for organizing hearings through videoconferences are provided for (Art. 114a Civil Procedure Act). It is sufficiently broad to include both non-evidentiary hearings (such as preparatory hearings) as well as evidentiary hearings. It is also sufficiently broad (although it has not been used in such way before) to enable that the 'second limb' of the video-link does not necessarily need to be in a court building (in another court, under a supervision of another judge), but in any 'other place'. The practice has so far been restrictive and it was perceived to be necessary that a video-link can only be established between two courts of law. It has been argued that in particular where witness testimony is contemplated, there should be another judge present in the place where the witness is giving testimony (in order to prevent undue interference with the witness testimony). But this might – in the light of current needs – change.

Another issue is the organization of in-camera sessions of chambers of appellate courts and of the Supreme Court (in Slovenia, there is practically never an open hearing in appellate courts and in the supreme court; the appeal is decided in written procedure, in an in-camera session of the chamber). There is no explicit legal basis that a chamber of e.g. an appellate court could hold the session via videolink. Neither is there any official IT support for such sessions. According to the Courts Act, the sessions of chambers are held in court buildings, whereas according to the emergency anti Covid-19 legislation, judges must – except in urgent cases – work from home. Nevertheless, rather *praeter legem*, some appellate judges have reported that they have held sessions via zoom platform and that some cases have been decided on appeal in such manner. The recent reports of security concerns regarding meetings held via the zoom platform have not helped this approach to flourish though.

There is another aspect which proves that the Slovenian civil procedure has been 'caught off-guard' by the coronavirus outbreak. A proper response by the judiciary is much easier to achieve if the rules of civil procedure are flexible and allow a judge a broad discretion as to how to adapt the course of proceedings to the specific circumstances and characteristics of

every case. If the procedural rules enable the judge, ideally in the agreement with the parties or at least after giving the parties' the right to comment, to choose between e.g. either more orality or more written procedure, either written witness statements or oral testimony, either scheduling preparatory hearings or opt for a written preparatory procedure. Unfortunately, both the law as well as the general perception within judiciary and the bar is still that a rigid procedural regime is preferred while the broad judicial discretion as to the conduct of procedure is frowned upon. It would exceed the scope of this paper to elaborate deeper on this point, but certainly one has to be aware of the inherent link between a general flexibility or rigidity of civil procedure rules on the one hand and the possibility for the courts to adapt to specific circumstances caused by the coronavirus outbreak on the other. In Slovenia for example, even in the agreement with the parties, if there are any facts that are in dispute (regardless of whether these could be established on the basis of documentary evidence) the oral hearing may not be waived and replaced by purely written procedure, at least not in general type of litigation.

The Attempted Reduction of Judges' Salaries as a Part of the Anti-Coronavirus Package

The situation, developments and dilemmas described above probably do not make Slovenia much different from numerous other countries hit by the outbreak. There however is a specific point where Slovenia is probably "endemic". It concerns the government's attempt to reduce judges' salaries as one of the measures within the "anti-corona measures package". Moreover, the issue of (possible) reduction of the judges' salaries was literally the very first issue concerning the impact of the coronavirus outbreak on the functioning of the judiciary.

A bit of the background: on Friday, 13 March 2020 the new government was sworn in after the previous coalition collapsed (this was not related to the coronavirus outbreak). Practically one of the first measures of the new government (14 March 2020) was to increase its own (i.e. of the prime minister and the ministers) salaries (for ca 10%).⁸ As by then, the coronavirus outbreak already hit hard, this sparked an outrage in the public opinion, following which, two days later, the government announced that it would decrease, temporarily, salaries of all state functionaries by 30%. It was announced that this would affect the prime minister and the government's ministers and state secretaries, furthermore the members of the parliament, the president of the Republic and the heads of certain governmental agencies, altogether around 150-200 people (in Slovenia, there are two categories of employment relation with the state: state functionaries, which are immediately vested with exercising state powers on the one hand and public servants on the other). Yet – which was not mentioned at the time - the measure would also affect judges, as they – as the exponents of the judicial branch of the state power – also have the status of 'state functionaries', not 'public servants'. In fact, this would be, by numbers, by far the most relevant group (there are around 900 judges in Slovenia).

An interesting controversy has developed, with possible broader implications. The representatives of the judiciary (the president of the Supreme Court and the president of the Judges Association) opposed the measure and stressed that guarantees concerning

⁸ The response of the government was a denial, arguing that 'they did not raise the salaries, they just put them into a different (higher) category of the schedules of salaries...' <https://vfokusu.com/post/536941/ukom-vlada-si-ni-povecala-plac>

judges' remuneration are inherently linked with the structural independence of judges and independence of the judiciary vis-à-vis the other two branches of state power. It was not – correctly, in my view – argued that there would be an absolute (constitutional) ban on judges' remuneration reduction. It was in principle acknowledges that judges may be expected to share their part in harshness of economic depression. However, a precondition thereof is that a pressing need would need to be established (of which it was still difficult to speak on the first day of the lockdown), that legislation should not be adopted hastily and representatives of the judiciary should be consulted and involved in the drafting process.⁹ Furthermore, due care should be given to the necessary preservation of the esteem of the profession. Concerning the latter, the representatives of the judiciary warned that a flat 30% reduction of salaries would disproportionately affect younger judges in first instance courts and it would make their monthly salary lower than the average monthly salary in Slovenia.¹⁰ Warnings were raised that if adopted, the measure would cause that a salary of many judges would become lower than the salary of their assistants and, in many cases, even lower than the salary of the courts' administrative staff.¹¹ This would be neither proportionate nor compatible with the need to preserve the symbolic appearance of the esteem and responsibility of the judicial office. The government, realizing that a reduction of the judges' salaries cannot be achieved through a interventionist urgent anti-corona legislation, then publicly called the president of the Supreme Court that the judiciary should itself lower its salaries. The (expected) answer was that the president of the Supreme Court has no powers to do that, only the legislature can.¹² The final outcome was that the adopted law decreased, temporarily, the salaries of all state functionaries except judges.¹³

Rather, this was the final outcome merely in the formal sense. The practical effect however was that the public trust in judiciary was further diminished. Not surprisingly, in this time, the public opinion is not much sensitive about the principles of judicial independence. On the contrary it is much more receptive to pictures portraying judges as a stringy elite which is not prepared to do its part in sharing the burdens of the (forthcoming) economic crisis. There are not few who suspect that the weakening of the judiciary in the eyes of the public

⁹ Musić I., Koliko bodo za omilitev posledic epidemije prispevali sodniki, SiolNET, 2 April 2020. <https://siol.net/novice/slovenija/koliko-bodo-za-omilitev-posledic-epidemije-prispevali-sodniki-video-522316>, Lebar J., Nižje plače ne veljajo za sodnike in tožilce, MMC, 25 March 2020. <https://www.rtvsl.si/slovenija/nizje-place-ne-veljajo-za-sodnike-in-tozilce/518313>

¹⁰ Lovšin P., <https://www.dnevnik.si/1042925533/slovenija/sodniki-ne-vidijo-zakonske-podlage-za-znizanje-svojih-plac>. According to the CEPEJ STUDIES No. 26: European judicial systems Efficiency and quality of justice (2018) among all member states of the Council of Europe Slovenia has the lowest average gross salary of judges in relation to the national average gross salary (on the other hand however, it has the second highest – except the miniature states – number of judges per capita). <https://rm.coe.int/overview-avec-couv-18-09-2018-en/16808def7a>

¹¹ Lebar J., Nižje plače ne veljajo za sodnike in tožilce, MMC, 25 March 2020. <https://www.rtvsl.si/slovenija/nizje-place-ne-veljajo-za-sodnike-in-tozilce/518313>

¹² Planinšič E., Protikoronski ukrepi: Vlada sodnikom ni znižala plač, a je nanje naslovila poziv; Večer, 24 March 2020 <https://www.vecer.com/portikoronski-ukrepi-vlada-sodnikom-ni-znizala-plac-a-je-nanje-naslovila-poziv-10147053>

¹³ Act Determining the Intervention Measures to Contain the Covid-19 Epidemic and Mitigate its Consequences for Citizens and the Economy; *Zakon o interventnih ukrepih za zajezitev epidemije COVID-19 in omilitev njenih posledic za državljane in gospodarstvo*. Official Gazette, No. 49/20).

opinion was the actual real purpose of the whole operation. The current ruling political party in Slovenia has been at odds with the judiciary for a long time. In an optimistic view however, this was, just like many other measures in this unprecedented time, an inadvertent error, committed under time-pressure, where it was simply overlooked that judges fall within the category of state functionaries. Still, the recent title in the newspaper, controlled by this party is telling: *'Do judges expect that for working from home they will even get a salary increase, when they should, like the government did, voluntarily accept a 30% decrease of their lucrative income for the time of the crisis!?'¹⁴*

Many aspects of the attempted decrease of judges' salaries as literally the first response to the coronavirus crisis, described above, have a distinct Slovenian – for many readers probably exotic – flavour. The whole issue however has much broader implications. In case the pessimistic predictions of economic depression come true, it will be inevitable that similar questions will be on the table worldwide. The interface between principles of structural judicial independence on the one hand and a legitimate expectation that the judges are not exempt from sharing the harshness of the economic downturn on the other hand will need to be critically reassessed.

¹⁴ Kranjc R., Si sodniki zaradi dela na domu obetajo celo višje prihodke, namesto, da bi se po zgledu vlade v času krize odpovedali trideset odstotkov svojih visokih plač?!, Demokracija, 25 March 2020.