

CROATIAN CIVIL JUSTICE V. COVID-19

The Empire Strikes Back

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1 INTRODUCTION: THE OLD NORMAL

Everyday debates on life before and during the pandemic often contrast the idyllic old normal and the dull, dangerous and depressing new normal. It is rarely questioned whether the pre-pandemic life was really so good. We all love our past.

However, in the context of Croatian civil justice and its encounter with the Covid-19, we need to revise our starting point. One can hardly escape the fact that for several years before the outbreak of the novel coronavirus, courts and judges have not enjoyed a very high level of public trust. Within the EU, the level of confidence in the independence of the courts and judges has been continually at the very bottom of the trust scale. According to European Judicial Scoreboard and several other sources, less than a quarter of Croatian citizens perceive the independence of Croatian courts as 'good' or 'fairly good', while over three-quarters consider that it is 'very' or 'fairly bad'.¹

The low score of the Croatian pre-pandemic judiciary is an accurate reflection of its current state. Emerging from socialist legal tradition, the national justice system has been subject to haphazard reforms since the early 1990s.² The period of bolder reform attempts conditioned by the country's EU accession ceased in 2013 when Croatia became a full EU member, resulting in many half-baked, half-hearted reforms. The remarkable resilience and capacity of the Croatian justice system to oppose adaptation to the challenges of modern times has been put to the test with the emergence of a new threat to the accustomed old normal. In this contribution I deal with the impact of Covid-19 on Croatian civil justice, seeking to establish whether the coronavirus outbreak achieved what many reformists failed to achieve in the past three decades: to modernize civil courts and civil justice.

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1 European Judicial Scoreboard (EJS) 2020, p. 41 (Figures 44, 46 and 48), https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en. The EJS data includes information provided by the European Commission for the Efficiency of Justice (CEPEJ), Eurobarometer and the World Economic Forum.

2 See A. Uzelac, 'Survival of the Third Legal Tradition', *Supreme Court Law Review*, Vol. 49, 2010, pp. 377-396.

2 STAGE ONE OF THE NEW NORMAL: HAS ANYONE NOTICED THE COURTS' PARALYSIS?

In Croatia, the outbreak of Covid-19 began, as in many other European states, in early March 2020. At the outset, the number of infected people was low, almost negligible, in comparison with that in many other states.

Apparently, in the first several months the lockdown measures were very efficient. In March and April, there were rarely more than 50 to 60 new infections daily. At the beginning of May 2020 there were hardly any new cases.³

On the other side, according to Frontex data, Croatia had in place some of the toughest restrictions to life and travel in March and April 2020, despite its coronavirus rates being among the lowest in Europe.⁴ Naturally, such restrictions also had their effect on the operation of national civil justice.

Since the Covid-19 epidemic was officially declared⁵ the courts have generally closed their doors to the public. In March and April 2020, all court hearings were postponed, and the scope of the courts' work was, in principle, reduced to a bare minimum. On the basis of a recommendation issued by the Supreme Court president, the judges were urged to limit their activity to completing paperwork for future activities and writing judgments and other decisions in cases that had already concluded. Only in urgent cases, and with all sanitary precautions, were judges allowed to hold judicial proceedings.⁶

Another disaster came on the heels of the Covid-19 outbreak. During the strictest lockdown, at 6:24 on the morning of 22 March 2020, a devastating earthquake struck Zagreb, leaving many buildings in the historical centre badly damaged. Damage was also caused to the Supreme Court headquarters as well as to the buildings of the county and commercial courts. This gave the biggest and most important civil courts in the country additional reason to suspend their activities.

The Covid-19 lockdown and the catastrophic earthquake did indeed shake the whole country. The public media was full of bad news, covering potentially deadly disease, financial losses incurred by many businesses and a significant drop in national GDP, as well as damage to historical sites and personal property that would need years to undo.

3 Compare Worldometer data, www.worldometers.info/coronavirus/country/croatia/; also John Hopkins University data, <https://github.com/CSSEGISandData/COVID-19>. The cumulative death toll from Covid-19 exceeded 100 only on 25 May 2020.

4 European Border and Coast Guard Agency, <https://frontex.europa.eu/media-centre/news-release/covid-19-restrictions-4IdY3J>.

5 SARS-COV2 epidemic was declared in Croatia by the decision of the Minister of Health, 011-02/20-01/143, no. 534-02-01-2/6-20-01 of 11 March 2020.

6 See Recommendation from the Supreme Court president of 20 March 2020, www.vsrh.hr/CustomPages/Static/HRV/Files/2020dok/Priopcenja/Preporuke%20za%20rad%202020.pdf.

Yet surprisingly little public attention was devoted to lack of access to courts and the paralysis of civil justice. It seems that, amidst other disasters, people least experienced the harm caused by the delays in the court system, which was even otherwise known to be slow and tardy, and in which postponements of several months were quite normal. In fact, many people considered the inaction of the civil courts more beneficial than their operation.

The government understood this and acted accordingly. In early 2020, the most important legislative act devoted to civil justice in the context of the Covid-19 outbreak was a statute that effectively reduced access to justice even further – the Act on Intervention Measures in Enforcement and Bankruptcy Proceedings.⁷ Under this law, effective from 1 May 2020, all enforcement and bankruptcy proceedings have been suspended for a three-month period, extendable by another three months.⁸ Consequently, barring very few cases,⁹ two fundamental branches of civil justice – enforcement and bankruptcy – were legally prevented from operating for half a year.¹⁰

Throughout this period, there were very few critical remarks in public regarding formal suspension and factual inactivity of national civil justice. On the other hand, the resumption of enforcement proceedings later in the year received more critical media coverage. In short, the civil courts' paralysis did not capture much public attention.

Seemingly, the only ones that were really concerned by civil justice lockdown measures were the insiders – the lawyers. What they wished was, however, not less, but more inactivity.

From the very beginning of the epidemic, the Croatian Bar Association (CBA) actively lobbied for the enactment of measures that would be applicable not only in enforcement and bankruptcy, but also in litigation and other proceedings. In mid-March 2020, it submitted to the Ministry of Justice a draft act on intervention measures that would be applicable to all court and administrative proceedings. The CBA considered the suspension of civil proceedings imposed by the government insufficient and proposed measures that would suspend all deadlines and limitation periods in all proceedings, except for a few urgent proceedings.¹¹

7 *Zakon o interventnim mjerama u ovršnim i stečajnim postupcima za vrijeme trajanja posebnih okolnosti* (ZIMOS), Narodne novine 53/20; *see also* amendments to the Monetary Funds Enforcement Act (MFEA, *Zakon o provedbi ovrhe na novčanim sredstvima*, Narodne novine 47/2020), which inserted two new articles (25.a and 25.b) on suspension of enforcement on bank accounts in exceptional circumstances.

8 *See* Arts. 3 Para. 1 and Art. 8 of the MFEA.

9 Only child maintenance claims, claims related to payment of salaries and protective measures from criminal proceedings were exempt from the suspension.

10 As the government used its authority to extend the suspension period (*see* Decision on extension of exceptional circumstances, Narodne novine 83/20), the suspension lasted until 18 October 2020.

11 *See* <http://www.hok-cba.hr/hr/obavijest-o-poduzetim-radnjama-hok-vezano-uz-covid-19-i-potres-u-zagrebu>.

The initiative of the CBA was not accepted, as it was seemingly obsolete. The justice minister had already sent a recommendation to all judicial bodies suggesting the postponement of hearings and other actions in all non-urgent proceedings for two weeks.¹² Soon afterwards, the Supreme Court president also recommended to presidents of all courts that they adjourn all unnecessary activities.¹³ And the courts were generally rather generous in postponing and adjourning actions, as they were aware of the travel ban and work-from-home rules.

However, as there was never any formal decision that would generally deal with interruption or suspension of time limits, the deadlines continued to run in many litigation proceedings. Different judges in different courts handled these situations in rather diverse ways. Consequently, there was a great deal of legal uncertainty for the parties and their representatives at that time,¹⁴ causing quite some confusion. But, again, the troubled situation of national civil justice did not cause any major public excitement. In a justice system in which hearings are regularly adjourned for many months and delays of more than six months occur even in urgent cases,¹⁵ judicial inactivity is hardly breaking news.

3 A TRACK OF HOPE: DIGITALIZATION REDISCOVERED

But the paralysis caused by the pandemic also had some positive collateral effects. For the first time, there was a chance that some rules, which had previously been only dead letter laws, would be taken more seriously. The lockdown had the potential to catalyse the use of modern technology.

Until the Covid-19 outbreak, digitalization in Croatian civil justice existed literally only on paper. In order to prove that the Croatian judiciary is improving, the Code of Civil Procedure (CCP) was amended in 2011 by new rules on audio recording of hearings. This looked appealing in the context of the impending 2013 EU accession, but the recording never took place in practice. Until 2015, some 120 courtrooms were equipped with appropriate gear, but it was never used. The CCP amendments of 2013 met with the same fate. Mandatory electronic communication for professional users was introduced in

12 See <https://pravosudje.gov.hr/vijesti/preporuke-za-prevenciju-prenosenja-i-suzbijanje-epidemije-novim-koronavirusom-sars-cov-2-bolesti-covid-19/21707>.

13 See *supra*, footnote 5.

14 On divergent court practices see A. Maganić, 'Utjecaj epidemije bolesti COVID-19 na sudske postupke', *Informator*, No. 6622, 10 April 2020, <https://informator.hr/strucni-clanci/utjecaj-epidemije-bolesti-covid-19-na-sudske-postupke>.

15 An illustration of this is the recent initiative of the Supreme Court president triggered by a high-profile medical malpractice case in which long periods of inactivity resulted in expiration of the limitation period; the SC president requested the Attorney General's office to supply information about all cases in which no activity has been recorded for over six months.

litigation proceedings before commercial courts, but these rules were to come into force when the ministry enacted implementing regulation – such regulation was not enacted until 2018.

Finally, the 2019 CCP amendments extended to all civil and commercial litigations the obligation of lawyers, experts and legal persons to utilize electronic communication. This time, the legislative formulation of coming into force was even more innovative: the rule on mandatory e-communication was to take effect “when the Minister of Justice establishes that all necessary prerequisites for effectiveness of this provision are fulfilled”.¹⁶ Although the 2019 amendments generally came into force in July 2019, nothing was done until the pandemic broke out. As electronic communication was not mandatory, no electronic communication was in place except in a few commercial courts, where it hesitantly started at the beginning of 2019.

Once everything was in lockdown, all of a sudden there was a pressing need to change the usual practices of the inert court system. Already in his first recommendation to court presidents, the Supreme Court president also recommended courts “to use all technically available options for distant communication, as well as for intra-court communication”.¹⁷ And the unthinkable suddenly became thinkable: on 20 April 2020, Minister of Justice (MoJ) passed a decree establishing that all prerequisites for electronic communication at all civil courts had been met.¹⁸

At first the MoJ decision led to confusion, as it was published almost invisibly, on the MoJ’s website, but not in the official gazette or on a wider information platform. It was also due to take effect instantly, and this caught almost every lawyer, attorney and corporate lawyer off guard. After almost 10 years of procrastination, everyone was forced, overnight, to communicate through an unfinished and bug-ridden electronic justice platform.

Yet in the prevailing emergency everyone had to suppress his or her surprise – and after a while it was amply clear that even an imperfect e-communication system is better than snail mail (especially when the postmen had difficulties distributing post owing to the lockdown, pervasive fear of infection and all imposed precautionary measures). Once the initial hiccups were overcome, at least the younger and more adaptable lawyers started to like the new system. The older ones still tried to circumvent it, but during that period their efforts did not jeopardize the effectiveness of the system as a whole.

Another rediscovered novelty was the provision on audiovisual remote hearings, also introduced by the CCP amendments in 2019. Although it had been in force since July 2019, until the coronavirus outbreak the provision that authorized the court “to arrange

16 See Art. 118 Para. 1 CCP. The mandatory electronic communication with the court encompassed lawyers, notaries, court-appointed experts and interpreters, insolvency administrators and commissioners, state attorneys, state bodies and all legal persons.

17 SCP recommendation, *see supra* note 5.

18 www.hok-cba.hr/hr/odluka-o-ispunjenju-uvjeta-za-elektronicku-komunikaciju-za-sudovima-u-rh.

court hearings or taking of evidence remotely, using appropriate audiovisual means¹⁹ was just another ornamental provision that was generally disregarded. Once the courts found themselves in a lockdown, this provision ceased to raise academic interest alone. A few younger and more proactive judges began to schedule hearings using online platforms such as Webex or Teams. As most of the others were still reposing in the paralysis of the national justice system, it was a small step for the court users. However, in terms of the attitude towards innovation, it was a giant leap. For the first time, it became clear that flexibility and innovation can find their place in the court system.

Paradoxically, during the pandemic many court services improved their accessibility for the public. For the first time, the court registries and similar court offices did not insist on queuing in order to submit paper documents, did not require paper signatures, answered the telephone calls and accepted email queries and scanned documents. While most of this was conditioned by fear of physical contact with the users, it was a breath of fresh air for court users long used to dealing with a tech-hostile judicial administration.

All in all, there was a ray of hope that Covid-19 would succeed where so many had failed – that it would modernize the *modus operandi* of Croatian civil justice. In a public debate on online court hearings, I voiced my opinion that the coronavirus was the best thing that could have happened to the Croatian judiciary.²⁰ However, on another occasion I expressed doubt about whether the momentum would be sufficient to prevent positive changes and whether the old normal would return as soon as the pandemic started to subside.²¹ Unfortunately, the doubt was justified.

4 THE PENDULUM HAS SWUNG: STAGE TWO OR THE PANDEMIC NEO-DARWINISM

In May 2020, the priorities in Croatian society and politics started to change. The pandemic was still there, but it was old news. Two fresh challenges emerged on the horizon: the 2020 tourist season and the parliamentary elections scheduled for early July.

While the number of new coronavirus cases in May was very low, the national economy was suffering, in particular from travel restrictions. In Croatia, the share of income from tourism is 18% of national GDP, the highest in Europe.

19 Art. 115 Para. 3 CCP (as amended in 2019).

20 See Jutarnji list, Kavkaska čajanka, 11 September 2020, www.jutarnji.hr/globus/video/koronavirus-je-najbolja-stvar-koja-se-mogla-dogoditi-hrvatskom-pravosu-15018469.

21 See discussions at the Zoom conference 'COVID + Civil Justice', University of Montreal, 15 May 2020, https://umontreal.zoom.us/rec/share/449rI6vrrFtJHK_D0mXiYJ4fOpzMeaa8hnlf8_AMn0qV2wdv3jZgyUHdbmjnsJ9k.

At the end of May 2020, preparing for the approaching parliamentary elections, Prime Minister Plenković declared that his government won the battle with the coronavirus.²²

Croatia has won the COVID-19, this Government has won the COVID-19, we have defeated the epidemics. What would have been the atmosphere in Croatia had we had 3,000 [corona] deaths?²³

Apparently, the PM's victory declaration helped him in the elections, which he won. But soon thereafter, we realized that the victory over the Covid-19- was temporary and that the war on Covid-19 was far from over. Summer of 2020 marked the start of the second stage of the pandemic, which has been dramatically different from the first stage in almost every detail. I will call it the stage of 'epidemiological neo-Darwinism'.

In short, in the second stage economic well-being turned out to be more important than saving human lives. The state undertook the 'calculated risk' of reopening. The state borders were opened to foreign tourists, and businesses – especially in the hospitality industry – resumed their operations, subject to only loosely enforced public safety recommendations.

Initially, this seemed to be a good formula, as the 2020 tourist season was much more profitable than expected,²⁴ but, while the spread of the infection was still tolerable in the summer months, the number of new coronavirus cases started to rise at the end of August. From October to December, it skyrocketed. Once known to be the best in fighting the spread of the infection, in December 2020 Croatia was one of the worst, with up to 4,600 new cases and a toll of up to 90 deaths daily.

In December 2020 the PM's rhetorical question voiced in May became reality. The cumulative toll of Covid-19 deaths reached 3,000 on 18 December; until mid-January, it surpassed 4,500, placing Croatia on a par with the EU countries that have the highest number of casualties per capita.²⁵ In November 2020, Croatia was the antipode of what it was in March: a country with the strictest restrictions and the lowest infection rates became a country with the loosest restrictions and the highest infection outbreak. Stricter restrictions were reintroduced only at the beginning of December, but have not so far reached the

22 'Plenković: Ova vlada je pobijedila koronavirus', Indeks, www.index.hr/vijesti/clanak/plenkovic-ova-vlada-je-pobijedila-koronavirus/2185893.aspx.

23 *Ibid.*

24 In August, the top-season tourist month, tourism cashed in about 60% of the revenue in the same period of the previous year (see www.slobodnaevropa.org/a/hrvatska-ljeto-turizam-sezona-corona/30813304.html).

25 At the moment of writing this contribution (17 January 2021), Croatia had 1,128 deaths per 1 million population – more than France (1,073) and only a bit less than Spain (1,140) and Italy (1,354). The figures could be even worse, as the number of unregistered casualties may be significant.

severity of those that were in place in Spring: economic survival still takes precedence over real human tragedy.

For the national justice system, it was also clear that the pendulum had swung to the other extreme. As one would expect, the reopening of courts proceeded at a slower pace than elsewhere. As already mentioned, cessation of enforcement and bankruptcy proceedings continued until mid-October, but court hearings in litigation cases gradually resumed since May. The proceedings were (and still are) subject to the general recommendations of the national Civil Protection Headquarters with regard to mandatory wearing of face masks and restrictions on the maximum number of people that may gather in the closed space. But for everything else, it was business as usual. And, almost as in the proverbial expression that history can only teach us about our inability to learn, many of the promising innovations in the judicial process started to fade away.

5 OLD NORMAL RETURNING AKA FIGHTING THE WAKE-UP CALL

Some difficulties in the adoption of modern technology occurred from the very beginning. They were not fatal, but they depict the essence of the problem – the portrait of civil justice, which is not far from the plastic expression used by J.H. Merryman, who once described judges in the civil law tradition as ‘faceless bureaucrats’.

For instance, the newly introduced mandatory electronic communication for the judicial system’s insiders turned out to be not so mandatory after all. Some lawyers simply continued to file their submission by post, facing no sanctions for their disobedience. On the contrary, the rules on electronic communication opened new opportunities for abuse of procedural rights.²⁶ The court work has not become much faster as the benefits of electronic communication have been offset by several setbacks. Electronic communication is not matched by an integral e-justice platform, and therefore all electronically received files must be printed out and inserted into paper files, causing additional delays and costs. In some cases, the court is overwhelmed, as lawyers submit voluminous electronic documents, bringing the capacity of the judicial system to its edge. Needless to say, Croatian courts are otherwise unaccustomed to dealing with filing, printing and studying thousands of pages in complex litigations. To make things worse, judges were spending a lot of time dealing with an unstable e-filing system that was crashing every few days.

26 For instance, Art. 106.a Para. 6 CCP (as amended in 2019) provided that if lawyers and other participants in mandatory electronic communication fail to file their submissions electronically (*i.e.* file a paper submission), they will be informed and requested to file their submission again electronically. Only if they do not file it again electronically, the submission will be deemed withdrawn. Filing a few submissions by post and waiting for the court reaction before filing again electronically may be a chance for a lawyer or an expert to protract the procedure and significantly extend procedural time limits.

All these practical problems have not led to abandoning the e-communication rules but have had an impact on the atmosphere: again, the judicial structures have been able to reinforce their conservatism, adducing proof that all these ‘novelties’ only make their life more difficult.

Consequently, since the start of the second stage of the pandemic, the attempts to innovate the way civil justice works started to dwindle. Adjusting civil litigation to the demands of modern life using the epidemiological crisis as a facilitative moment was no longer a priority. Online hearings, although legally permitted and possible, again became a rarity. According to a brief survey, since January 2021²⁷ in the Municipal Court in Zagreb (the biggest court of general jurisdiction) virtually no remote hearings have taken place, while in the Commercial Court in Zagreb (the biggest commercial court) they do take place, but only about one-fifth of judges have had one or more remote hearings.

The signals from the top of the judicial hierarchy certainly do not encourage audio and videoconferencing. The same Supreme Court president who, in March 2020, recommended the use of all technically available options for remote communication, suggests, in January 2021, that the use of judicial information platforms and the holding of remote hearings encroach on the right to a fair trial.²⁸ The reasons for the change in tune are that, allegedly, the legislative provision that authorizes courts to conduct hearing remotely is insufficient. According to the SC president, it does not specifically elaborate on how publicity of remote hearings is secured, nor does it specify whether courts can order such hearings without parties’ permission. In short, as in similar situations where the conservative judicial system wishes to obstruct progressive changes, the message is that law needs to be amended to be ‘more precise’ – and, of course, until that time the present ‘imprecise’ provisions on remote hearings need to be avoided.

6 *POST FESTUM: HOW MANY CATASTROPHES WILL BE ENOUGH FOR A SECOND CHANCE?*

Predicting the course of future development is a difficult and thankless task. The second Covid-19 wave in Croatia peaked at the beginning of December 2020, but until January 2021 the number of infections was falling again. Another catastrophe struck the country, on 29 December 2020. It was another devastating earthquake, this time 30 to 60 times as strong as the previous one. However, the affected region was not the capital but the poorest part of the country around the cities of Petrinja, Sisak and Glina. Everyday life is obstructed

²⁷ For the purpose of this text, I have collected information from judges of the two largest courts in Zagreb.

²⁸ Đ.Sessa, ‘Sudovi u uvjetima pandemije i pravo na pošteno suđenje’, Okrugli stol HAZU o primjeni prava za vrijeme pandemije bolesti Covid-19, 21 January 2021 (speech).

again; more than 10 thousand houses are either completely destroyed or badly damaged; and many schools, hospitals and state institutions in that region had to interrupt their operations.

Of course, some courts also had to stop their operations. Hearings in municipal courts in Sisak and local court seats in Petrinja, Glina and Kostajnica have been adjourned sine die.²⁹ Indeed, this would seem like another situation in which flexible and innovative solutions could mitigate the consequences of catastrophic events. But this is hardly going to happen, just as it is not very probable that many user-friendly practices created in the new normal will survive in the post-Covid-19 civil justice. Or maybe this is too pessimistic an assessment?

It is indicative that all 2020 catastrophes brought a host of changes in many spheres of life, including some brilliant examples of innovation, bravery and quick adjustment to the worst challenges – but mainly in the areas outside of the national justice system. The reshuffling of health services and the selfless work of doctors, nurses, teachers, emergency services and many others demonstrated that really essential public services in Croatia have a capacity to adapt. Their efforts and transformations were eagerly followed in the public media. For all these essential services it is likely that life after Covid-19 will never be the same. Will it be the same for Croatian civil justice? As things stand, the craving for a return to the old normal has survived several catastrophes. The opportunity for a fundamental change has been missed. How many new catastrophes would be needed to provide a second chance for a profound transformation of national civil justice? New catastrophes will, hopefully, not happen soon, but if a second chance does not come soon, for our civil justice it would be a catastrophe in itself. Because, if another chance is missed, it will be unmistakably clear that civil justice in its present form is not a really essential public service.

29 <https://sudovi.hr/hr/ossk/priopcenja/obavijest-o-privremenom-smjestaju-izdavanje-uvjerenja-i-odgodaraspava-do-daljnjeg>.