Pandemic and Fragile Government: A Year of COVID-19 Fatigue and Disorder in Ukraine

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The pandemic has exposed all the weaknesses and shortcomings of the Ukrainian health protection system, which has been on a periphery of the national reforms agenda for many years. In many regards, the Ukrainian way to protect the population against infectious diseases remains ineffective and fragmented and based of outdated Soviet-time approaches and methods. To date, Ukraine is one of the unfortunate leaders among European countries in confirmed Covid-19 cases and coronavirus death tolls. There is still no clear national strategy on how to prevent the further spread of Covid-19 in Ukraine is in place. The President of Ukraine and the Ministry of Health of Ukraine forecasted the terms of vaccination under the WHO COVAX initiative. However, detailed arrangements are far from being in place.

Ukraine has got through four and awaiting two anti-epidemic governmental responses: total lockdowns (March-May 2020), adaptive-regional quarantine (May – November 2020), a weekend quarantine (November 2020), transition to a new "soft" lockdown (December 2020), and "soft" lockdown (January 2021). Despite multi-tier approaches introduced by the Cabinet of Ministers of Ukraine, there were no signs of such quarantine policy's effectiveness, i.e., numbers of confirmed Covid-19 cases have been growing exponentially even against non-mandatory Covid test practices in Ukraine. The national pandemic response uncovered, apart from exceptional hardships faced before the health protection system, the junctures of state of governance in Ukraine which are highly exposed to risk.

This paper comprises three parts. In the first part, we analyse the standoff between the Ukrainian regional and local authorities and the central government regarding the implementation of the all-nation quarantine policy and Covid-19 related restrictions. In the second part, we analyse trends of legal responsibility for the quarantine violations in Ukraine. In the final part, we reflect upon the decision of the Constitutional Court of Ukraine on the constitutionality of the quarantine limitations and capture the complex dynamics of the transitional legal system and justice in Ukraine against the background of the legality of pandemic measures in Ukraine.

The Standoff Between the Local Authorities and Central Government

The first tensions between mayors of cities and the Government of Ukraine exacerbated in May 2020 when the mayor of the city Cherkasy in Central Ukraine Anatoliy Bondarenko announced that Cherkasy shall not follow the governmental quarantine policy. Despite a contentious dialogue between the President of Ukraine Volodymyr Zelensky and mayor Anatoliy Bondarenko, no political responsibility and legal consequences for the mayor of Cherkasy took place. Even more, Anatoliy Bondarenko was successfully re-elected in the forthcoming local elections (November 2020) while continuously declaring that Cherkasy would not abide by the governmental anti-epidemic regulation.

The same anti-epidemic electoral rhetoric was upheld in other regions of Ukraine, for instance, by mayors of Lviv Andrii Sadovyi in Western Ukraine and Slovyansk Vadym Liakh in Eastern Ukraine, and, subsequently, found support among voters who re-elected both mayors in their respective cities. These local elections somehow relieved the confrontation between regions and Kyiv on the matter of quarantine restrictions and calmed the political storm caused thereby.

Still, some unpleasant flashbacks when certain Eastern and Southern Ukrainian local councils opposed the central government of Ukraine during the Revolution of Dignity in 2013-14 echoed today. That confrontation between Kyiv and regions had traumatic consequences. For instance, Nelya Shtepa, mayor of Sloviansk (Donetsk region) in 2014, publicly asked President Putin to protect Sloviansk and, consequently, to join Russia. Thus, local mayors' public rhetoric and their denial to follow governmental (central) pandemic restrictions policy brought back painful memories from 2014.

The Responsibility Quest for Quarantine Violators

The reaction of the Ukrainian judiciary proved the complete inefficiency of the regulation governing the responsibility of those who violate quarantine rules in Ukraine. By the end of November 2020, the Ukrainian courts have considered around 26,500 administrative cases on quarantine wrongdoings. Only in 2,200 cases, the Ukrainian courts found violations of quarantine regulations, i.e., it means that more than 90% of the administrative proceedings were groundless. Information regarding criminal responsibility is relatively modest. There are dozens (up to 100) of criminal cases opened on the grounds of violations of the quarantine restrictions (for instance, one of the criminal cases concerned private test laboratory which had not informed the Ministry of Health of Ukraine about several confirmed Covid-19 cases in due time). To sum up, the Ukrainian government introduced many quarantine limitations, nevertheless, it was unable to ensue effective compliance system nationwide. In most cases legal responsibility for those who violate quarantine rules remains an exception.

The Non-Implemented Decision of the Constitutional Court of Ukraine

The government's quarantine resolution (*Postanova*) №392 from 20 May 2020 was successfully challenged before the Constitutional Court of Ukraine (the Court) in August 2020. The Court implicitly outlawed the quarantine limitations enacted under the relevant Cabinet of Ministers of Ukraine's resolution as unconstitutional under the reasoning that any human rights limitations (restrictions on freedom of assembly or religion) can be prescribed only by national laws but not under executive subsidiary legislation.

The challenged quarantine resolution №392 from 20 May 2020 issued by the government of Ukraine was no longer in force when the Court considered the case in substance. It allowed the Court to opt between four options: first, not to review the challenged governmental quarantine resolution at all (technically, it was already not in force); second, to review the ongoing quarantine policy undertaken by the government as a whole (the government has already issued up to 10 legal acts on the subject matter of the quarantine wherein certain human rights limitations were provided); third, to review outdated resolutions and to consider their constitutionality (whenever not affecting the current quarantine rules); fourth, to scrutinize the challenged resolution of the Cabinet of Ministers of Ukraine and its follow-up resolutions (which replaced the challenged resolution). Doing that, the Court took up the third option, which seemed to be more suitable regarding its legal certainty and consequences for the legal system of Ukraine. The Court concluded that the outdated resolution №392 from 20 May 2020 was unconstitutional but because it was no longer in force, the Court would make no further actions regarding the contested resolution. In few days, unconstitutional provisions of resolution №392 were merely transferred to a newly adopted resolution №641 (and, subsequently, to resolutions №1100, and №1236 and others).

Concluding Remarks

We outlined at least three critical junctures which the pandemic of Covid-19 faced in Ukraine. The first juncture lies in the constitutionality of enacted restrictive measures by the Government of Ukraine. In our opinion the Constitutional Court of Ukraine was not able to solve the problems of compliance under the constitutional constraint (including, freedom of assembly or religion). The second juncture stems from institutional incapacity of law enforcement agencies in Ukraine to control the compliance with the quarantine rules in all

Ukraine regions. Finally, the third juncture reveals an open demarche against Covid-19 related restrictive measures by local Ukrainian communities and large cities which obtained more powers in course of the decentralization reform on the eve of the pandemic. Failure to provide an adequate legal response and action for these challenges may lead to undermining the effective application of principles of rule of law and good governance as a foundation of the Europeanisation process in Ukraine.

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